ADDENDUM TO APPELLEE'S BRIEF

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STATE CONSTITUTION (EXCERPT)
CONSTITUTION OF MICHIGAN OF 1963

ARTICLE I
DECLARATION OF RIGHTS

§ 1 Political power.

Sec. 1. All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

History: Const. 1963, Art. I, § 1, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 1.

§ 2 Equal protection; discrimination.

Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

History: Const. 1963, Art. I, § 2, Eff. Jan. 1, 1964.

§ 3 Assembly, consultation, instruction, petition.

Sec. 3. The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.

History: Const. 1963, Art. I, § 3, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 2.

§ 4 Freedom of worship and religious belief; appropriations.

Sec. 4. Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

History: Const. 1963, Art. I, § 4, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 3.

§ 5 Freedom of speech and of press.

Sec. 5. Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

History: Const. 1963, Art. I, § 5, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 4.

§ 6 Bearing of arms.

Sec. 6. Every person has a right to keep and bear arms for the defense of himself and the state.

History: Const. 1963, Art. I, § 6, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 5.

§ 7 Military power subordinate to civil power.

Sec. 7. The military shall in all cases and at all times be in strict subordination to the civil power.

History: Const. 1963, Art. I, § 7, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 6.

§ 8 Quartering of soldiers.

Sec. 8. No soldier shall, in time of peace, be quartered in any house without the consent of the owner or occupant, nor in time of war, except in a manner prescribed by law.

History: Const. 1963, Art. I, § 8, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 7.

§ 9 Slavery and involuntary servitude.

Sec. 9. Neither slavery, nor involuntary servitude unless for the punishment of crime, shall ever be tolerated in this state.

History: Const. 1963, Art. I, § 9, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 8.

§ 10 Attainder; ex post facto laws; impairment of contracts.

Sec. 10. No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.

History: Const. 1963, Art. I, § 10, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 9.

§ 11 Searches and seizures.

Sec. 11. The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

History: Const. 1963, Art. I, § 11, Eff. Jan. 1, 1964.

Constitutionality: The last sentence of this section was held invalid as in conflict with US Const, Am IV. *Lucas v People*, 420 F2d 259 (CA 6, 1970); *Caver v Kropp*, 306 F Supp 1329 (DC Mich 1969); *People v Pennington*, 383 Mich 611; 178 NW2d 460 (1970); *People v Andrews*, 21 Mich App 731; 176 NW2d 460 (1970).

Former constitution: See Const. 1908, Art. II, § 10.

§ 12 Habeas corpus.

Sec. 12. The privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion the public safety may require it.

History: Const. 1963, Art. I, § 12, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 11.

§ 13 Conduct of suits in person or by counsel.

Sec. 13. A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.

History: Const. 1963, Art. I, § 13, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 12.

§ 14 Jury trials.

Sec. 14. The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree.

History: Const. 1963, Art. I, § 14, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 13.

§ 15 Double jeopardy; bailable offenses; commencement of trial if bail denied; bail hearing; effective date.

Sec. 15. No person shall be subject for the same offense to be twice put in jeopardy. All persons shall, before conviction, be bailable by sufficient sureties, except that bail may be denied for the following persons when the proof is evident or the presumption great:

(a) A person who, within the 15 years immediately preceding a motion for bail pending the disposition of an indictment for a violent felony or of an arraignment on a warrant charging a violent felony, has been convicted of 2 or more violent felonies under the laws of this state or under substantially similar laws of the United States or another state, or a combination thereof, only if the prior felony convictions arose out of at least 2 separate incidents, events, or transactions.

(b) A person who is indicted for, or arraigned on a warrant charging, murder or treason.

(c) A person who is indicted for, or arraigned on a warrant charging, criminal sexual conduct in the first degree, armed robbery, or kidnapping with intent to extort money or other valuable thing thereby, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.

(d) A person who is indicted for, or arraigned on a warrant charging, a violent felony which is alleged to

have been committed while the person was on bail, pending the disposition of a prior violent felony charge or while the person was on probation or parole as a result of a prior conviction for a violent felony.

If a person is denied admission to bail under this section, the trial of the person shall be commenced not more than 90 days after the date on which admission to bail is denied. If the trial is not commenced within 90 days after the date on which admission to bail is denied and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of bail for the person.

As used in this section, "violent felony" means a felony, an element of which involves a violent act or threat of a violent act against any other person.

This section, as amended, shall not take effect until May 1, 1979.

History: Const. 1963, Art. I, § 15, Eff. Jan. 1, 1964;—Am. H.J.R. Q, approved Nov. 7, 1978, Eff. May 1, 1979.

Effective date: The language certified by the Board of Canvassers was identical to House Joint Resolution Q of 1978, except for the deletion of the last sentence which contained the proposed May 1, 1979, effective date.

The May 1, 1979, effective date provision of House Joint Resolution Q was not stated in the text of ballot Proposal K or in any of the material circulated by the Secretary of State, and was neither considered nor voted upon by the electors in the November 7, 1978, general election.

Therefore, the effective date of Proposal K is December 23, 1978, which was the date 45 days after the election as provided by Const. 1963, Art. XII, § 1. Op. Atty. Gen., No. 5533 (1979).

Former constitution: See Const. 1908, Art. II, § 14.

§ 16 Bail; fines; punishments; detention of witnesses.

Sec. 16. Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.

History: Const. 1963, Art. I, § 16, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 15.

§ 17 Self-incrimination; due process of law; fair treatment at investigations.

Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

History: Const. 1963, Art. I, § 17, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 16.

§ 18 Witnesses; competency, religious beliefs.

Sec. 18. No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.

History: Const. 1963, Art. I, § 18, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 17.

§ 19 Libels, truth as defense.

Sec. 19. In all prosecutions for libels the truth may be given in evidence to the jury; and, if it appears to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the accused shall be acquitted.

History: Const. 1963, Art. I, § 19, Eff. Jan 1. 1964.

Former constitution: See Const. 1908, Art. II, § 18.

§ 20 Rights of accused in criminal prosecutions.

Sec. 20. In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

History: Const. 1963, Art. I, § 20, Eff. Jan. 1, 1964;—Am. H.J.R. M, approved Aug. 8, 1972, Eff. Sept. 23, 1972;—Am. S.J.R. D, approved Nov. 8, 1994, Eff. Dec. 24, 1994.

Former constitution: See Const. 1908, Art. II, § 19.

§ 21 Imprisonment for debt.

Sec. 21. No person shall be imprisoned for debt arising out of or founded on contract, express or implied, except in cases of fraud or breach of trust.

History: Const. 1963, Art. I, § 21, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 20.

§ 22 Treason; definition, evidence.

Sec. 22. Treason against the state shall consist only in levying war against it or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act or on confession in open court.

History: Const. 1963, Art. I, § 22, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 21.

§ 23 Enumeration of rights not to deny others.

Sec. 23. The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.

History: Const. 1963, Art. I, § 23, Eff. Jan. 1, 1964.

§ 24 Rights of crime victims; enforcement; assessment against convicted defendants.

Sec. 24. (1) Crime victims, as defined by law, shall have the following rights, as provided by law:

The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.

The right to timely disposition of the case following arrest of the accused.

The right to be reasonably protected from the accused throughout the criminal justice process.

The right to notification of court proceedings.

The right to attend trial and all other court proceedings the accused has the right to attend.

The right to confer with the prosecution.

The right to make a statement to the court at sentencing.

The right to restitution.

The right to information about the conviction, sentence, imprisonment, and release of the accused.

(2) The legislature may provide by law for the enforcement of this section.

(3) The legislature may provide for an assessment against convicted defendants to pay for crime victims' rights.

History: Add. H.J.R. P, approved Nov. 8, 1988, Eff. Dec. 24, 1988.

§ 25 Marriage.

Sec. 25. To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

History: Add. Init., approved Nov. 2, 2004, Eff. Dec. 18, 2004.

§ 26 Affirmative action programs.

Sec. 26. (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan

anti-discrimination law.

(7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

(8) This section applies only to action taken after the effective date of this section.

(9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

History: Add. Init., approved Nov. 7, 2006, Eff. Dec. 23, 2006.

§ 27 Human embryo and embryonic stem cell research.

Section 27. (1) Nothing in this section shall alter Michigan's current prohibition on human cloning.

(2) To ensure that Michigan citizens have access to stem cell therapies and cures, and to ensure that physicians and researchers can conduct the most promising forms of medical research in this state, and that all such research is conducted safely and ethically, any research permitted under federal law on human embryos may be conducted in Michigan, subject to the requirements of federal law and only the following additional limitations and requirements:

(a) No stem cells may be taken from a human embryo more than fourteen days after cell division begins; provided, however, that time during which an embryo is frozen does not count against this fourteen day limit.

(b) The human embryos were created for the purpose of fertility treatment and, with voluntary and informed consent, documented in writing, the person seeking fertility treatment chose to donate the embryos for research; and

(i) the embryos were in excess of the clinical need of the person seeking the fertility treatment and would otherwise be discarded unless they are used for research; or

(ii) the embryos were not suitable for implantation and would otherwise be discarded unless they are used for research.

(c) No person may, for valuable consideration, purchase or sell human embryos for stem cell research or stem cell therapies and cures.

(d) All stem cell research and all stem cell therapies and cures must be conducted and provided in accordance with state and local laws of general applicability, including but not limited to laws concerning scientific and medical practices and patient safety and privacy, to the extent that any such laws do not:

(i) prevent, restrict, obstruct, or discourage any stem cell research or stem cell therapies and cures that are permitted by the provisions of this section; or

(ii) create disincentives for any person to engage in or otherwise associate with such research or therapies or cures.

(3) Any provision of this section held unconstitutional shall be severable from the remaining portions of this section.

History: Add. Init., approved Nov. 4, 2008, Eff. Dec. 19, 2008.

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1461 Voting agreements between shareholders.

Sec. 461. An agreement between 2 or more shareholders, if in writing and signed by the parties, may provide that in exercising voting rights, the shares held by them shall be voted as provided in the agreement, or as they may agree, or as determined in accordance with a procedure agreed upon by them. A voting agreement executed pursuant to this section, whether or not proxies are executed pursuant to the agreement, is not subject to sections 466 through 468. A voting agreement under this section shall be specifically enforceable.

History: 1972, Act 284, Eff. Jan. 1, 1973;—Am. 1989, Act 121, Eff. Oct. 1, 1989.

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1488 Shareholder agreement.

Sec. 488. (1) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with this act in 1 or more of the following ways:

(a) It eliminates the board or restricts the discretion or powers of the board.

(b) It governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to limitations in sections 345 and 855a pertaining to the protection of creditors.

(c) It establishes who shall be directors or officers of the corporation, or the terms of office or manner of selection or removal of directors or officers of the corporation.

(d) In general or in regard to specific matters, it governs the exercise or division of voting power by or between the shareholders and directors or by or among any of the shareholders or directors, including use of weighted voting rights or director proxies.

(e) It establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation or among the shareholders, directors, officers, or employees of the corporation.

(f) It transfers to 1 or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders.

(g) It requires dissolution of the corporation at the request of 1 or more of the shareholders or if a specified event or contingency occurs.

(h) It establishes that shares of the corporation are assessable and includes the procedures for an assessment and the consequences of a failure by a shareholder to pay an assessment.

(i) It otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors, and the corporation, or among any of the shareholders or directors, and is not contrary to public policy.

(2) An agreement authorized by this section shall meet both of the following requirements:

(a) Is set forth in a provision of the articles of incorporation or bylaws approved by all persons that are shareholders at the time of the agreement, or in a written agreement that is signed by all persons that are shareholders at the time of the agreement and that is made known to the corporation.

(b) Is subject to amendment only by all persons that are shareholders at the time of the amendment, unless the agreement provides otherwise.

(3) The existence of an agreement authorized under this section shall be noted conspicuously on the face or back of a certificate for shares issued by the corporation or on the information statement required under section 336. If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement does not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares that did not have knowledge of the existence of the agreement at the time ownership is transferred is entitled to rescission of the purchase. A purchaser has knowledge of the existence of the agreement at the time ownership is transferred if the agreement's existence is noted on the certificate or information statement in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or before the time ownership of the shares is transferred. An action to enforce the right of rescission authorized under this subsection must be commenced within 90 days after discovery of the existence of the agreement or 2 years after the shares are transferred, whichever is earlier.

(4) An agreement authorized under this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.

(5) If an agreement authorized under this section is no longer effective for any reason and is contained or referred to in the corporation's articles of incorporation or bylaws, the board may without shareholder action adopt an amendment to the articles of incorporation or bylaws to delete the agreement and any references to it.

(6) An agreement authorized under this section that limits the discretion or powers of the board shall relieve the directors of, and impose on the person or persons in which the discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement. The person or persons in whom the discretion or powers are vested are

treated as a director or directors for purposes of any indemnification and any limitation on liability under section 209(1)(c).

(7) The existence or performance of an agreement authorized under this section is not grounds for imposing personal liability on any shareholder for the acts or debts of the corporation or for treating the corporation as if it were a partnership or unincorporated entity, even if the agreement or its performance results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(8) Dissolution pursuant to an agreement authorized in subsection (1)(g) shall be implemented by filing a certificate of dissolution under section 805.

(9) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized under this section if shares have not been issued when the agreement is made.

(10) The failure to satisfy the unanimity requirement of subsection (2) with respect to an agreement authorized under this section does not invalidate any agreement that would otherwise be considered valid.

History: Add. 1997, Act 118, Imd. Eff. Oct. 24, 1997;—Am. 2001, Act 57, Imd. Eff. July 23, 2001;—Am. 2012, Act 569, Imd. Eff. Jan. 2, 2013.

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1489 Action by shareholder.

Sec. 489. (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:

(a) The dissolution and liquidation of the assets and business of the corporation.

(b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

(c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.

(d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

(e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

(f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

(2) No action under this section shall be brought by a shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.

(3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

History: Add. 1989, Act 121, Eff. Oct. 1, 1989;—Am. 1997, Act 118, Imd. Eff. Oct. 24, 1997;—Am. 2001, Act 57, Imd. Eff. July 23, 2001;—Am. 2006, Act 68, Imd. Eff. Mar. 20, 2006.

Legislative Analysis

HOUSE FISCAL AGENCY

Mitchell Bean, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

BUSINESS CORPORATION ACT AMENDMENTS

House Bill 5315
Sponsor: Rep. James Marleau

House Bill 5316
Sponsor: Rep. Lorence Wenke

House Bill 5317
Sponsor: Rep. Bill Huizenga

House Bill 5318
Sponsor: Rep Leslie Mortimer

House Bill 5319
Sponsor: Rep. Tonya Schuitmaker

House Bill 5320
Sponsor: Rep. Kevin Elsenheimer

House Bill 5321
Sponsor: Rep. Judy Emmons

House Bill 5322
Sponsor: Rep. David Law

House Bill 5323
Sponsor: Rep. Steve Tobocman

Committee: Commerce

Complete to 11-7-05

A SUMMARY OF HOUSE BILLS 5315-5323 - AS INTRODUCED 10-18-05

Each of the bills would amend a different section of the Business Corporation Act (MCL 450.1101 et seq.). The following is a description of changes to the act that the bills appear to be making.

House Bill 5315 would rewrite and re-arrange the provision that requires a foreign (out-of-state) corporation to comply with Sections 1021 (dealing with amended applications) and 1035 (the filing of required information) in order to merge with or enter into a share exchange with a domestic (in-state) corporation.

House Bill 5316 would amend a section addressing the dissolving of companies to say that the dissolution depends, among other things, on proof that shareholders who have entered into *an agreement authorized by Section 488* are unable to agree on material matters respecting management of the corporation's affairs or are divided in voting power so as to be unable to elect successor directors. The reference to the Section 488 agreement replaces a reference to the shareholders acting under the corporation's articles of incorporation. Section 488 allows shareholders to enter into agreements to exercise the corporate powers or the management of the business, even to the extent of eliminating the board of directors or restricting their powers.

House Bill 5317 would amend a section that allows for amendments to the articles of incorporation. Some amendments can be made by the board without shareholder action; others require shareholder approval. The bill would amend language dealing with shareholder approval to say that: "Other amendments of the articles of incorporation, except

as otherwise provided in this act, shall be proposed by the board and approved by the shareholders as provided in this section. The board may condition its submission of the amendment to the shareholders on any basis." The underlined portions are the new language.

House Bill 5318 would amend a section dealing with committees of a corporation created by the board to specify that a committee could create one or more subcommittees and delegate all or part of its power or authority to a subcommittee, unless prohibited by a resolution of the board, the articles of incorporation, or the bylaws.

House Bill 5319 would specify that when a shareholder abstains from voting or submits a ballot marked "abstain," that does not count as a vote cast (unless the articles provide otherwise). This affects a section that requires actions to be authorized by "a majority of votes cast." House Bill 5320 would make a similar amendment to a section that deals with voting by a class or series of shares. The two bills are tie-barred.

House Bill 5321 addresses cases where a corporation is required or desires to provide a written notice, report, statement, or communication to shareholders sharing a common address. The bill would allow them to do so if all of the following requirements were met: 1) the corporation addresses the writing to shareholders as a group, individually, or in any other form to which there are no shareholder objections; 2) the corporation gives at least 60 days notice to the shareholders sharing the common address; 3) there are no written objections from any shareholder with the common address. If there is an objection, the corporation would have to begin providing separate copies to those who have objected within 30 days of receiving the objection.

House Bill 5322 addresses when documents filed with the relevant state administrator become effective. The bill specifies that "when endorsed by the administrator, a document becomes effective as of the date of receipt, unless a subsequent effective date, not later than 90 days after the date of delivery, is set forth in the document." This rewrites the existing provision that says the document is effective when it is endorsed.

House Bill 5323 would amend the definition in the act of "willfully unfair and oppressive conduct" to specify that such conduct could include *the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder*. Under the act, for example, a shareholder can bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or *willfully unfair and oppressive* to the corporation or to the shareholder

FISCAL IMPACT:

There is no fiscal impact on the State of Michigan or its local units of government.

Legislative Analyst: Chris Couch
Fiscal Analyst: Richard Child

This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone (517) 373-5383
Fax (517) 373-1986
TDD: (517) 373-0543

House Bill 5323 (as passed by the House)
Sponsor: Representative Steve Tobocman
House Committee: Commerce
Senate Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 2-22-06

CONTENT

The bill would amend the Business Corporation Act to include in its definition of "willfully unfair and oppressive conduct" by a corporation the termination of employment or limitations on employment benefits to the extent that the actions interfered with distributions or other shareholder interests disproportionately as to the affected shareholder. The bill also would allow a corporation to give guarantees to a domestic or foreign limited liability company.

Willfully Unfair & Oppressive Conduct

Under the Act, a shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.

"Willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

Under the bill, willfully unfair and oppressive conduct could include the termination of employment or limitations on employment benefits to the extent that the actions interfered with distributions or other shareholder interests disproportionately as to the affected shareholder.

Limited Liability Company Guarantees

Under the Act, a corporation, subject to certain limitations, has the power to make contracts, give guarantees and incur liabilities, borrow money at rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property or an interest in its property. This power includes the power to give guarantees that are necessary or convenient to the conduct, promotion, or attainment of the business of any of the following corporations, whether or not subject to the Act:

-- All of the outstanding shares of which are owned, directly or indirectly, by the contracting corporation.

-- A corporation that owns, directly or indirectly, all of the outstanding shares of the contracting corporation.
-- All of the outstanding shares of which are owned, directly or indirectly, by a corporation, whether or not subject to the Act, that owns, directly or indirectly, all of the outstanding shares of the contracting corporation.

Under the bill, the power to make contracts, give guarantees, incur liabilities, etc. would include the power to give guarantees that were necessary or convenient to the conduct, promotion, or attainment of the business of any of the following corporations, whether or not subject to the Act, and domestic or foreign limited liability companies:

-- All of the outstanding shares or interests of which were owned, directly or indirectly, by the contracting corporation.
-- A corporation or limited liability company that owned, directly or indirectly, all of the outstanding shares of the contracting corporation.
-- All of the outstanding shares or interests of which were owned, directly or indirectly, by a corporation, whether or not subject to the Act, or a limited liability company that owned, directly or indirectly, all of the outstanding shares of the contracting corporation.

As currently provided, those guarantees would have to be considered to be in furtherance of the corporate purpose of the contracting corporation.

MCL 450.1106 et al.

Legislative Analyst: J.P. Finet

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Elizabeth Pratt
Maria Tyszkiewicz

S0506\s5323sa

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone (517) 373-5383
Fax (517) 373-1986
TDD: (517) 373-0543

House Bill 5323 (as reported without amendment)
Sponsor: Representative Steve Tobocman
House Committee: Commerce
Senate Committee: Economic Development, Small Business and Regulatory Reform

CONTENT

The bill would amend the Business Corporation Act to include in its definition of "willfully unfair and oppressive conduct" by a corporation the termination of employment or limitations on employment benefits to the extent that the actions interfered with distributions or other shareholder interests disproportionately as to the affected shareholder. The bill also would allow a corporation to give guarantees to a domestic or foreign limited liability company.

Under the Act, a shareholder may bring an action in the circuit court to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.

"Willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The bill would expand the definition as described above.

MCL 450.1106 et al.

Legislative Analyst: J.P. Finet

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Date Completed: 2-27-06

Fiscal Analyst: Elizabeth Pratt
Maria Tyszkiewicz

JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
LANSING

ROBERT W. SWANSON
ACTING DIRECTOR

Analysis of Enrolled House Bill 5323

Topic:	Definition of Willful and Unfair Conduct
Sponsor:	Representative Huizenga
Co-Sponsors:	Representative Tobocman
Committee:	House Commerce
	Senate Economic Development, Small Business & Regulatory Reform
Date Introduced:	October 18, 2005
Date Enrolled:	March 2, 2006
Date of Analysis:	Revised March 3, 2006

Position: The Department of Labor & Economic Growth supports the bill.

Problem/Background:

This bill is in response to the case *Franchino v. Franchino*, by the Michigan Court of Appeals decided in 2004. The court concluded that there is not a private cause of action when a shareholder's employment by the corporation is terminated under willfully unfair and oppressive conduct by the majority shareholder, when it does not affect his interest as a shareholder.

Description of Bill:

The bill is intended to give the shareholder a cause of action against the corporation when his employment by the corporation is terminated by willfully unfair and oppressive conduct on behalf of the corporation.

Arguments For:

The Court of Appeals in *Franchino* applied the provision narrowly and ruled that it did not permit termination of employment to be considered as shareholder oppression. The amendment is intended to authorize consideration of employment actions if the actions disproportionately affect shareholder interests, such as through denial of shareholder distributions or a termination of employment to coerce shareholder action.

It expands the rights of the shareholder, as a shareholder. It is trying to protect the minority shareholder from the majority shareholder, where he is an employee of the corporation, from being terminated by the willfully unfair and oppressive conduct of the majority shareholder.

Arguments Against:

This bill does not actually do what it is meant to do. It was meant to solve the situation that was presented in the *Franchino* case where a minority shareholder, who was an employee of the corporation, is terminated. They are trying to provide the shareholder with a cause of action, but the court determined that there was no cause because his interest was not affected "*as a shareholder.*" This bill only provides him a cause of action if the willfully unfair and oppressive

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conduct affects his interest as a shareholder. If it does not affect his interest "*as a shareholder*" there will be no cause of action.

Supporters:

Business Law Section of the State Bar of Michigan

Opponents:

The only opposition to any of the bills in this package was to House Bill 5322. The Department of Labor & Economic Growth opposed House Bill 5322, because the problem that the bill was designed to solve had already been addressed in the expedited fee bills.

Other Pertinent Information:

This bill is part of a package of bills (House Bills 5315-23) developed by the Business Law Section of the State Bar of Michigan as part of a regular review of Michigan's corporation laws. These reviews occur roughly at four-year intervals.

Administrative Rules Impact:

There is no administrative rules impact.

Fiscal Impact:

There is no fiscal impact.

2009 WL 1567359
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Deborah **ANDREOZZI** and Clarence Lorentz, Plaintiffs–Appellants,
v.
STONY POINT PENINSULA ASSOCIATION, Barbara Orr, Jana Burnette, Steve Williams, Barclay Stewart, Kathleen B. Loveridge, Brian Dotson, Nancy Jordan, Don Johnson and Robert Groulx, Defendants–Appellees.

Docket No. 281113. | June 4, 2009.

West KeySummary

1 **Municipal Corporations**
⇐ Powers of council or other governing body
Public Contracts
⇐ Manner of making contract
The board of trustees of a resort owner's association was entitled to enter into a contract with the majority approval of its members, pursuant to state statute. Although the bylaws of the association required a 2/3 vote to approve a contract of over $500, the summer resort owners corporation act superseded the associations bylaws and allowed for majority approval. M.C.L.A. §§ 450.1231, 455.219.

Monroe Circuit Court; LC No. 05–020288–CZ.

Before: JANSEN, P.J., and METER and FORT HOOD, JJ.

Opinion

PER CURIAM.

*1 Plaintiffs appeal by right the circuit court's grant of summary disposition in favor of defendants. We affirm, albeit for different reasons than those relied upon by the circuit court.

I

This case arises out of plaintiffs' claim that defendants[1] improperly levied an assessment to dredge a canal on lands under the control of the Stony Point Peninsula Association (the association). Although the Stony Point Peninsula area was originally platted in the 1920s, the association was not incorporated until 1963, at which time articles of incorporation were filed in accordance with the summer resort owners corporation act, 1929 PA 137, MCL 455.201 *et seq.* The 1963 articles of incorporation describe the purpose of the association in the following manner:

> To acquire or receive by gift, maintain, develop and service property known as Stony Point Peninsula, Frenchtown Township, Monroe County, Michigan as per the recorded plat thereof, or land adjacent thereto. To lease, [or] sell said land or portion thereof as shall be approved by a majority of [the] Members at the Annual Meeting. In compliance with the provisions of [the summer resort owners corporation a]ct the trustees shall enact, subject to the approval of the members[,] general by-laws pertaining to police powers, control of streets, sanitation, and such other provisions as are provided by [the summer resort owners corporation a]ct.

Sometime before September 2004, defendants became aware that the association's canal was in need of dredging. In early September 2004, defendants issued a written notice announcing that the association's annual meeting would be held on October 2, 2004, and informing the members that the proposed 2004–2005 annual budget would be considered at that time. Attached to the notice was a proposed annual budget, which included a line item labeled "Proposed Canal Dredge Project" in the amount of $110,000. The proposed annual budget made clear that, upon approval of the canal-dredging project by the members, each member would be responsible for paying a prorated portion of the $110,000 amount.

At the annual meeting, a motion was made to "approve the canal dredging project for $110,000." Although the prorated amount that each member would be required to pay for

the project was described in the minutes as a "proposed assessment," the minutes made clear that the $110,000 expense would be included as a line item in the "capital improvements portion" of the annual budget. Of the 270 votes cast on the motion, 153 (56 # percent) were cast in favor of the canal-dredging project, and 117 (43 # percent) were cast in opposition to the canal-dredging project. The motion was declared to have carried, and defendants included the $110,000 cost in the final budget. Defendants entered into a contract with a dredging company and began collecting each member's prorated portion of the $110,000 amount.

Plaintiffs filed suit in the Monroe Circuit Court, alleging that the canal-dredging expenditure was a "special assessment," and that pursuant to the association's bylaws, it had required approval by two-thirds of the members and proxies voting at the annual meeting. Plaintiffs argued that because the expenditure had only been approved by 56 # percent of the members and proxies voting, defendants were without authority to enter into the canal-dredging contract or to collect the prorated portions of the $110,000 cost.

*2 The circuit court granted summary disposition in favor of defendants, concluding that the association's board of directors had been authorized to enter into the canal-dredging contract and to charge the association's members for the cost of the project.

II

We review de novo a circuit court's decision to grant or deny summary disposition. *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337, 572 N.W.2d 201 (1998). We similarly review de novo matters of statutory interpretation, *Toll Northville Ltd v. Northville Twp.*, 480 Mich. 6, 10–11, 743 N.W.2d 902 (2008), and all other questions of law, *Cowles v. Bank West*, 476 Mich. 1, 13, 719 N.W.2d 94 (2006).

III

A

Under the summer resort owners corporation act, a group of 10 or more property owners may form a summer resort owners corporation by filing articles of incorporation, also known as articles of association,[2] in accordance with the act. MCL 455.201. Upon filing such articles, "the persons so associating, [and] their successors and assigns, shall become and be a body politic and corporate, under the name assumed in their articles ... and shall have and possess all the general powers and privileges and be subject to all the liabilities of a municipal corporation and become the local governing body." MCL 455.204. All property owners holding lands within the county and "contiguous to the resort community in which the corporation is organized" are eligible to become members of the corporation. MCL 455.206.

The general corporate governance authority of a summer resort owners corporation is vested in a board of directors, also known as a board of trustees. MCL 455.206; MCL 455.209; MCL 455.210. The board has the authority to enact bylaws, which are "subject to repeal or modification by the members at any regular or special meeting...." MCL 455.212. Specifically, the board may enact bylaws for any of the following purposes:

> To keep all [the corporation's] lands in good sanitary condition; to preserve the purity of the water of all streams, springs, bays or lakes within or bordering upon said lands; to protect all occupants from contagious diseases and to remove from said lands any and all persons afflicted with contagious diseases; to prevent and prohibit all forms of vice and immorality; to prevent and prohibit all disorderly assemblies, disorderly conduct, games of chance, gaming and disorderly houses; to regulate billiard and pool rooms, bowling alleys, dance halls and bath houses; to prohibit and abate all nuisances; to regulate meat markets, butcher shops and such other places of business as may become offensive to the health and comfort of the members and occupants of such lands; to regulate the speed of vehicles over its streets and alleys and make general traffic regulations thereon; to prevent the roaming at large of any dog or any other animal; to compel persons occupying any part of said lands to keep the same in good sanitary condition and the abutting streets and highways and sidewalks free from dirt

and obstruction and in good repair. [MCL 455.212.]

B

*3 The Business Corporation Act, 1972 PA 284, MCL 450.1101 *et seq.*, expressly applies to "summer resort associations" to the extent that it is not inconsistent with the specific acts under which those summer resort associations were formed. MCL 450.1123(1). An entity formed under the summer resort owners corporations act is statutorily described as a "corporation" rather than as an "association." MCL 455.201; MCL 455.204. Therefore, it is not immediately apparent whether such an entity is a "summer resort association" within the meaning of MCL 450.1123(1). But for the reasons set forth below, we conclude that entities formed under the summer resort owners corporation act do, indeed, constitute "summer resort associations" within the meaning of MCL 450.1123(1).

It is the longstanding opinion of the Attorney General that entities formed under the summer resort owners corporation act qualify as "summer resort associations" within the meaning of MCL 450.1123(1). OAG 1975–1976, No. 5065, p 734 (December 17, 1976); see also OAG 2003–2004, No. 7164, p 167 (October 7, 2004). While opinions of the Attorney General are not binding on this Court, we find the Attorney General's opinion on this matter persuasive for the following reasons. See *Risk v. Lincoln Charter Twp.*, 279 Mich.App. 389, 398–399, 760 N.W.2d 510 (2008).

In addition to the summer resort owners corporation act, Chapter 455 of the Michigan Compiled Laws, entitled "Summer Resort and Park Associations," includes the summer resort and park associations act, 1897 PA 230, MCL 455.1 *et seq.*, the summer resort and assembly associations act, 1889 PA 39, MCL 455.51 *et seq.*, and the suburban homestead, villa park, and summer resort associations act, 1887 PA 69, MCL 455.101 *et seq.*[3] Each of these acts allows individuals to associate under certain circumstances for the purpose of acquiring, owning, or improving real property. Although each of the acts contains its own distinct provisions, the four acts also share many similarities. See 2 Cameron, Michigan Real Property Law, § 21.36, pp 1225–1228. Whereas the summer resort and assembly associations act and the suburban homestead, villa park, and summer resort associations act describe the entities formed thereunder as "association[s]," MCL 455.51; MCL 455.101, the summer resort and park associations act and the summer resort owners corporation act describe the entities formed thereunder as "corporation[s]," MCL 455.1; MCL 455.201. Nonetheless, the summer resort and park associations act and the summer resort owners corporation act describe the original incorporators as "the persons associating," MCL 455.2, and as "the persons so associating," MCL 455.202. Moreover, all four acts contain at least one provision that describes the incorporating document required thereunder as the "articles of association." See, e.g., MCL 455.2; MCL 455.52; MCL 455.103; MCL 455.202. In light of the placement of the summer resort owners corporation act in the overall statutory scheme, see *Tallman v. Dep't of Natural Resources*, 421 Mich. 585, 600, 365 N.W.2d 724 (1984), and the use of the terms "associating" and "articles of association" in the summer resort owners corporation act, we conclude that entities formed under the summer resort owners corporation act do constitute "summer resort associations" within the meaning of MCL 450.1123(1). Accordingly, the Business Corporation Act applies to summer resort owners corporations to the extent that it is not inconsistent with the summer resort owners corporation act. MCL 450.1123(1).

IV

*4 Although plaintiffs' amended complaint did not contain distinct and separately entitled causes of action, it is apparent that plaintiffs attempted to set forth a claim for declaratory relief under MCR 2.605, and a shareholders oppression claim under MCL 450.1489. We are not bound by a party's choice of labels in the complaint because this would exalt form over substance. *Johnston v. Livonia*, 177 Mich.App. 200, 208, 441 N.W.2d 41 (1989). Instead, we read the pleadings as a whole and look beyond the procedural labels to determine the exact nature of the claims asserted. See *MacDonald v. Barbarotto*, 161 Mich.App. 542, 547, 411 N.W.2d 747 (1987).

Plaintiffs requested that the circuit court declare that the cost of the canal-dredging project was a "special assessment," that a two-thirds vote of the association's members had been required to approve the $110,000 expenditure, and that because the expenditure had not been approved by two-thirds of the membership, it was "unauthorized, invalid, and unenforceable." We conclude that plaintiffs properly requested declaratory relief in this regard. "MCR 2.605 provides that a court may declare the rights and legal relations of an interested party seeking a declaratory judgment in a

case of actual controversy within its jurisdiction." *Kircher v. Ypsilanti*, 269 Mich.App. 224, 226, 712 N.W.2d 738 (2005).

The complaint also made clear that plaintiffs were asserting a shareholder oppression claim pursuant to MCL 450.1489. The cause of action created by MCL 450.1489 is a cause of action for oppression, running in favor of minority shareholders in a closely held corporation. *Estes v. Idea Engineering & Fabrications, Inc.*, 250 Mich.App. 270, 278, 649 N.W.2d 84 (2002). Although plaintiffs are members of a summer resort owners corporation, and are not in actuality "shareholder[s]" of a closely held business, they are certainly similar in many respects to minority shareholders of a closely held corporation. Specifically, the gravamen of plaintiffs' complaint was that the association's controlling members and directors had engaged in oppressive conduct by violating a supermajority voting requirement in the bylaws, and had thereby trampled upon the voting rights of the minority members. Similar conduct, if committed within the confines of a closely held business corporation, would likely give rise to a cause of action for oppression under MCL 450.1489. See *Franchino v. Franchino*, 263 Mich.App. 172, 184–186, 687 N.W.2d 620 (2004) (observing that MCL 450.1489 protects the interests of a shareholder "as a shareholder" and that "[s]hareholder's rights are typically considered to include voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends"). As we explained more fully in section III(B), *supra*, the Business Corporation Act applies to summer resort owners corporations to the extent that it is not inconsistent with the summer resort owners corporation act. Therefore, even though plaintiffs are not technically shareholders of a closely held business corporation, we conclude that they were entitled to sue for oppression-like conduct pursuant to MCL 450.1489.[4] See MCL 450.1123(1).

V

*5 Plaintiffs argue that the association's bylaws required an affirmative two-thirds vote before defendants could enter into the canal-dredging contract at issue, that only 56 # percent of the members and proxies voting at the annual meeting actually approved the contract and expenditure, and that defendants therefore engaged in ultra vires conduct by implementing the canal-dredging project and charging the members for its cost.

The bylaws of Stony Point Peninsula Association state that "[t]he officers or board of directors shall not enter any contract or purchase or sell property, real or personal, if the amount exceeds $500. All purchases in excess thereof must be approved at the Annual, or a duly called Special Meeting of the Corporation by a # vote of members and proxies present." The parties do not contest that the board entered into a contract in excess of $100,000 and that when the motion was presented at the annual meeting it was supported by less than two-thirds of the members and proxies voting.

The circuit court concluded that although the bylaws required a two-thirds vote before the board of directors could approve a contract or expenditure exceeding $500, the board was nonetheless authorized to enter into the contract at issue in this case because it had general supervisory power over the association's property and common areas, and an accompanying duty to maintain the association's canal. Given this theorized duty, the circuit court determined that the board was not required to abide by the two-thirds requirement in the bylaws when implementing the canal-dredging project.

We conclude that the board's general duty to maintain the canal, to the extent that any such duty existed,[5] could not overcome the specific supermajority provision in the association's bylaws. The relevant statutory language provides that "[t]he board of trustees shall have the management and control of all the business and all the property, real and personal, of the corporation and shall represent the corporation, with full power of authority to act for it in all things legal whatsoever, *and subject only to restrictions or limitations imposed by the by-laws of the corporation and any special restriction or limitation imposed by a vote of the members* ...." MCL 455.210 (emphasis added). While the beginning language of MCL 455.210 indicates that the board has broad power over an association's property, the latter portion clearly indicates that the power may be limited by the association's bylaws or a vote of the membership. In this case, the bylaws, which were adopted by the association's members, plainly and clearly limited the board's power to enter into contracts or expenditures in excess of $500 by requiring that at least two-thirds of the members and proxies voting approve such an expenditure. Under MCL 455.210, this duly enacted bylaw provision superceded any general duty to maintain the canal that the board might have possessed.

*6 Defendants argue that, irrespective of whether the board had a general duty to maintain the canal, the two-thirds

voting provision in the association's bylaws was invalid under the Business Corporation Act. They contend that, under the Business Corporation Act, a supermajority voting requirement must be contained in the articles of incorporation rather than in the bylaws. In support of this contention, defendants cite MCL 450.1441(2), which provides in relevant part:

> Other than the election of directors, if an action is to be taken by vote of the shareholders, it shall be authorized by a majority of the votes cast by the holders of shares entitled to vote on the action, unless a greater vote is required in the articles of incorporation or another section of this act.

But MCL 450.1455, another section of the Business Corporation Act, belies defendants' argument in this regard. The final sentence of MCL 455.1455 provides that "[t]he failure to include [a supermajority voting requirement] in the articles shall not invalidate any by-law or agreement which would otherwise be considered valid." This provision makes clear that when the bylaws require supermajority approval for a given action, that requirement is valid even if it has not been included in the articles of incorporation, so long as the bylaw provision was otherwise properly enacted or adopted. Indeed, legislative analyses prepared at the time the final sentence of MCL 455.1455 was added by 1989 PA 121 indicate that the purpose of the sentence was to "[a]dd a new provision to preclude any inference that a high vote provision [i]s invalid unless included in the articles." Senate Legislative Analysis, Senate Bill 181 (as enrolled), July 24, 1989; see also Senate Legislative Analysis, Senate Bill 181, April 25, 1989.[6] Accordingly, under MCL 450.1455, we conclude that a supermajority voting requirement contained in the bylaws is not invalid merely because it is not included in the articles of incorporation.

We are convinced, however, that the plain language of the summer resort owners corporation act is inconsistent with, and therefore supercedes, the two-thirds voting requirement in the association's bylaws. At the time this action was commenced, MCL 455.219[7] provided that "[t]he corporation may assess annual dues and special assessments against its members, *by a vote of a majority* thereof" (emphasis added). Defendants argue that this statutory language took precedence over the supermajority provision contained in the association's bylaws, and that in light of the 56 # percent approval obtained at the annual meeting, they were entitled to proceed with the canal-dredging project notwithstanding the bylaw provision. We agree with defendants in this regard.

As noted above, a supermajority voting requirement contained in the bylaws is not invalid merely because it has not been included in the articles of incorporation. MCL 450.1455. However, as a general rule, the bylaws may not contain any provision that is "inconsistent with law...." MCL 450.1231. Under the version of 455.219 in effect at the time, only a majority vote of the members of a summer resort owners corporation was required to approve the assessment of annual dues and special assessments. Former MCL 455.219. And the summer resort owners corporation act, itself, makes no allowance for the placement of supermajority voting requirements in the articles or bylaws. We conclude that the supermajority voting requirement contained in the association's bylaws was "inconsistent with" the language of the former MCL 455.219, and that the former MCL 455.219 consequently superceded the inconsistent bylaw provision. See MCL 450.1231. In other words, only a majority vote of the membership was required to approve the canal-dredging project and collection of the related costs in this case. Former MCL 455.219.

*7 Plaintiffs contend that the cost of the dredging project was a "special assessment." In contrast, defendants contend that because the project cost was included in the association's annual budget, it was not a "special assessment" but was merely a part of the "annual dues." We need not resolve this dispute. The language of the former 455.219 applied equally to both annual dues and special assessments. Thus, irrespective of whether the prorated amounts assessed against the members to pay for the canal-dredging project were "annual dues" or "special assessments," only a "vote of a majority" of the members and proxies[8] was required to approve the canal-dredging project and expenditure. Former MCL 455.219.

In sum, the supermajority requirement contained in the association's bylaws was "inconsistent with law" to the extent that it imposed a higher vote requirement than was imposed by MCL 455.219. See MCL 450.1231. The plain statutory language of the former MCL 455.219, requiring only "a vote of a majority" of the membership, superceded the inconsistent supermajority requirement contained in the association's bylaws. Because a majority of the association's members and proxies voted to approve the canal-dredging project and expenditure, defendants were authorized to implement the

project, to include it in the annual budget, and to charge the association's members for the cost of the project.[9]

Given that defendants were authorized to implement the canal-dredging project and to charge the association's members for its cost, see former MCL 455.219, plaintiffs were not entitled to the declaratory relief they sought in this case. For the same reasons, we cannot conclude that defendants' conduct was "illegal, fraudulent, or willfully unfair and oppressive" within the meaning of MCL 450.1489(1). It is axiomatic that we will not reverse if the circuit court has reached the correct result, even if it has done so for the wrong reasons. *Taylor v. Laban*, 241 Mich.App. 449, 458, 616 N.W.2d 229 (2000).[10]

VI

In light of our conclusion that defendants were entitled to implement the canal-dredging project and charge the association's members for the cost of the project, we need not determine whether defendants were entitled to governmental immunity in this case. Nor do we address the alternative grounds for affirmance raised by defendants on appeal.

Affirmed. No taxable costs under MCR 7.219, a public question having been involved.

Footnotes

1 The individual defendants are or were members of the Stony Point Peninsula Association board of directors.

2 The document required for the formation of a summer resort owners corporation is variously described as the "articles of incorporation," MCL 455.201, and as the "articles of association," MCL 455.202. However, it is apparent that the "articles of incorporation" described in MCL 455.201 and the "articles of association" described in MCL 455.202 are the same document.

3 Chapter 455 of the Michigan Compiled Laws also contains other statutes that are not relevant to this case.

4 We reject defendants' assertion that plaintiffs were required to bring a derivative claim on behalf of the corporation rather than a direct claim in their own right. The complaint made clear that plaintiffs were suing to vindicate their own voting rights as minority members of the association, and not merely to enforce rights that belonged to the association itself. Indeed, as this Court has observed, the statutory claim created by MCL 450.1489 "is a direct cause of action, not derivative, and though similar to a common-law shareholder equitable action, provides a separate, independent, and statutory basis...." *Estes*, 250 Mich.App. at 278, 649 N.W.2d 84.

5 We expressly decline to decide whether such a general duty to maintain the association's canal existed under MCL 455.210. We need not reach this issue to resolve the present appeal.

6 We acknowledge that legislative analyses are " 'generally unpersuasive tool[s] of statutory construction' " because they "are prepared by House and Senate staff members and do not necessarily represent the views of any individual legislator." *Kinder Morgan Michigan, LLC v. City of Jackson*, 277 Mich.App. 159, 170, 744 N.W.2d 184 (2007) (citation omitted). Nevertheless, "legislative bill analyses do have probative value in certain, limited circumstances." *Id.*

7 MCL 455.219 was amended by 2006 PA 44, but still requires "a vote of a majority" of the members before a summer resort owners association's board may assess annual dues or special assessments. MCL 455.219(2).

8 Members of a summer resort owners corporation may vote by proxy to approve annual dues or special assessments at an annual meeting. See OAG 1975–1976, No. 5065, p 734 (December 17, 1976).

9 We note that, as a precondition to the assessment of annual dues and special assessments, the former MCL 455.219 required approval by a majority of *all* association members rather than by a mere majority of the members and proxies present and voting. Former 455.219; see also OAG 2003–2004, No. 7164, p 167 (October 7, 2004). However, it appears that this requirement was satisfied in the case at bar. The minutes of the annual meeting indicated that although there were only 270 votes cast on the canal-dredging motion, there were 297 "Total Eligible Votes," consisting of "[a]ll votes [of][m]embers in good standing." As noted previously, of the 270 votes actually cast on the motion, 153 were cast in favor and 117 were cast in opposition. The 153 votes cast in favor of the motion constituted a majority of the 297 total eligible member votes in existence at the time of the annual meeting.

10 We have presumed for purposes of this appeal that the Stony Point Peninsula Association's corporate existence did not expire by limitation in 1993. The duration of a summer resort owners corporation may not exceed 30 years. MCL 455.202. At the expiration of the initial 30–year term, a summer resort owners corporation may reincorporate and renew its existence for one additional 30–year period. MCL 455.281. The Stony Point Peninsula Association's original 1963 articles of incorporation provided for a 30–year corporate existence. In September 1993, the association filed a certificate of amendment to its articles of incorporation, providing that the corporation's existence would be "perpetual" from that time forward. Although a business corporation is authorized to have a perpetual existence, MCL 450.1261(n), a summer resort owners corporation *may not* have a perpetual existence, MCL 455.202.

Thus, the 1993 amendment, calling for a "perpetual" existence, exceeded the scope of the statute. Nonetheless, because plaintiffs do not dispute that the association was authorized to reincorporate and renew its existence, and in the absence of any evidence or argument to the contrary, we consider the 1993 amendment as having effectively extended the corporate existence for one additional 30-year period under MCL 455.281.

End of Document

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Igor **BERGER**, a/k/a Gerald **Berger**, Plaintiff/Counter–Defendant
v.
Alla **KATZ** and Paul **KATZ**, Defendants/ Counter–Plaintiffs–Appellants.
Igor **Berger**, a/k/a Gerald **Berger**, Plaintiff–Appellant,
v.
Alla **Katz** and Paul **Katz**, Defendants–Appellees.

Docket Nos. 291663, 293880. | July 28, 2011.

Wayne Circuit Court; LC No. 07–707413–CZ.

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

Opinion

PER CURIAM.

*1 Plaintiff and defendants are the owners of IPAX Cleanogel, Inc., a corporation that sells industrial cleaners. [1] Plaintiff owns a one-third interest and defendants together own the remaining two-thirds interest in the corporation. Plaintiff filed this action in 2007, alleging willfully unfair and oppressive conduct by defendants, as the majority shareholders, contrary to MCL 450.1489, and alleging additional common-law claims for breach of fiduciary duty, breach of contract, and promissory estoppel. Defendants filed a counterclaim against plaintiff for breach of fiduciary duty. The common-law claims were tried before a jury, which awarded plaintiff $22,000 against each defendant for breach of fiduciary duty. The jury also determined that plaintiff breached a fiduciary duty to defendants, but did not award any damages for the breach. The trial court thereafter conducted a bench trial on plaintiff's statutory claim and found that defendants violated MCL 450.1489 by engaging in willfully unfair and oppressive conduct as majority shareholders. As a remedy for the violation, the court prescribed a buyout procedure whereby one side could purchase the fair value of the other side's shares in the corporation. If that was not possible, the court would appoint a receiver to liquidate the corporation. The trial court also ordered defendants to "reimburse the corporation the amount of legal fees and costs that the corporation paid out for Defendants [sic] willful misconduct in this case." In addition, the court ordered that, during the interim, plaintiff was to be paid $2,000 a month and receive other benefits until the corporation changed hands or was sold. After the trial court entered its final judgment, plaintiff filed a motion for case evaluation sanctions. The trial court determined that plaintiff was not entitled to sanctions and denied the motion. Defendants now appeal as of right in Docket No. 291663, and plaintiff appeals as of right in Docket No. 293880, challenging the denial of case evaluation sanctions. Because the only error established on this record is the trial court's refusal to award plaintiff case evaluation sanctions, we affirm the judgments for plaintiff, but reverse the trial court's order denying case evaluation sanctions and remand for a determination of sanctions.

This action arises from a strained business relationship between plaintiff and defendants. The parties together established IPAX Cleanogel, Inc. ("IPAX"), to create and market environmentally friendly cleaning products to various industries. The parties also formed API, L.L.C. ("API"), as a holding company for the warehouse and manufacturing facility that it leased to IPAX for its operations. The parties cooperatively operated IPAX for many years, during which time they equally divided the profits and equally participated in decisions affecting the company.

In 2006, plaintiff moved to California and was no longer involved in the day-to-day operations of the business, although he claimed that he continued to be involved in developing business opportunities for the company. Not long thereafter, defendants stopped making distributions to plaintiff and stopped consulting with him on matters involving the company. Plaintiff complained and, following substantial negotiations, the parties agreed to an interim arrangement whereby, pending a final agreement, plaintiff was paid $2,000 a month as advance distributions on profits from IPAX and $2,000 a month as his share of rental income from API, subject to reconciliation at the end of the year. The parties were never able to formally resolve their dispute and they disagreed on the financial condition of the company. Defendants eventually stopped making payments to plaintiff, claiming that the company was losing business and was no longer profitable. Plaintiff claimed that defendants resorted to tactics designed to benefit themselves personally and to

artificially lower the corporation's profits to avoid paying him his fair share of his one-third interest in the corporation.

I. DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

*2 Defendants first argue that the trial court erred in denying their trial motion for a directed verdict with respect to plaintiff's breach of fiduciary duty claim, and in denying their post-trial motion judgment notwithstanding the verdict ("JNOV"). This Court reviews de novo a trial court's ruling on a motion for a directed verdict or JNOV. *Sniecinski v. Blue Cross & Blue Shield of Michigan*, 469 Mich. 124, 131; 666 NW2d 186 (2003). This Court must review the evidence and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party. The motion should be granted only if the evidence fails to establish a claim as a matter of law. *Id.* If reasonable minds could differ regarding the evidence, the issue is for the jury and a directed verdict or JNOV is improper. *McPeak v. McPeak (On Remand)*, 233 Mich.App 483, 490; 593 NW2d 180 (1999).

We disagree with defendants' argument that plaintiff could not prevail on his breach of fiduciary duty claim because plaintiff admitted on cross-examination that he was suing defendants for amounts that he claimed were due from IPAX and API. Although plaintiff agreed that IPAX and API were directly liable for any corporate distributions, plaintiff's theory of the case was that defendants used their control as majority shareholders to manipulate the corporation's financial condition and to divert corporate profits to themselves, to either minimize or foreclose the availability of distributions to plaintiff. Majority shareholders in a corporation owe "the utmost good faith in its control and management as to the minority and it is the essence of this trust that it must be so managed so as to produce to each shareholder, the best possible return upon his investment." *Salvador v. Comor*, 87 Mich.App 664, 675; 276 NW2d 458 (1978), quoting 6 Callaghan's Michigan Civil Jurisprudence (2d ed), § 166, p. 365. Where the evidence shows that majority shareholders improperly diverted corporate funds, a breach of fiduciary duty of the majority shareholders can be found. *Salvador*, 87 Mich.App at 675–677. The evidence that defendants ceased making payments to plaintiff, no longer sought plaintiff's input on matters involving the corporation, and substantially increased their own salaries, at a time when they claimed the corporation was no longer profitable, supports the trial court's decision to submit plaintiff's breach of fiduciary duty claim to the jury.

Defendants also contend that the jury's award of $44,000 in damages is not consistent with the evidence. The jury rejected plaintiff's breach of contract claim, thereby indicating that it did not find an enforceable agreement for defendants to pay plaintiff either $4,000 a month until IPAX was sold, or for defendants to pay equal compensation to plaintiff as long as they all worked for IPAX. Nonetheless, there is no reason why the jury could not have found, consistent with the evidence, that plaintiff was still entitled to his share of the profits from IPAX, as a shareholder of the corporation. There was evidence from which the jury could have found that defendants artificially deflated the corporation's profits by paying themselves excessive salaries and other expenses unrelated to the business, which thereby prevented plaintiff from receiving his fair share of the profits as a shareholder of the corporation. Even if the jury looked to the evidence of the parties' interim arrangement as a basis for determining damages, that is not a reason to set aside the jury's verdict. The evidence showed that the parties had agreed on a figure of $4,000 a month while attempting to reach a final agreement. The jury properly could have found that even though the parties never reached a final agreement, the interim amount reflected plaintiff's damages for defendants' breach of their fiduciary duties. Therefore, defendants have not shown that the jury's verdict was not supported by the evidence.

II. ADDITUR

*3 Defendants next argue that the trial court erred by denying their motion for additur with respect to their counterclaim. This Court reviews a trial court's decision on a motion for additur for an abuse of discretion. *Hill v. Sacka*, 256 Mich.App 443, 460; 666 NW2d 282 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v. Hidalgo*, 478 Mich. 151, 158; 732 NW2d 472 (2007).

Defendants' counterclaim alleged that plaintiff breached common-law fiduciary duties as a shareholder and director of IPAX when he voluntarily ceased his employment and moved to California. Defendants also claimed that they were personally damaged when plaintiff incurred corporate debt for his own personal benefit, and that his actions decreased the value of the corporation's stock. The jury found that plaintiff

breached a fiduciary duty to defendants, but declined to award damages for the breach.

A trial court is permitted to grant a new trial whenever a party's substantial rights have been materially affected, such as where the jury's verdict was either clearly or grossly inadequate or influenced by passion or prejudice. MCR 2.611(A)(1)(c) and (d). If the court finds that the jury's verdict is inadequate, the nonmoving party has the right to accept or reject a new award in lieu of a new trial. See MCR 2.611(E)(1). "When reviewing a trial court's decision on additur, this Court must consider whether the jury award was supported by the evidence." *Hill*, 256 Mich.App at 460. This Court will uphold a jury's verdict if an interpretation of the evidence provides a logical explanation for the jury's findings. *Id.* at 461.

Defendants requested additur in the amount of $27,000. They contended that the evidence showed that plaintiff received $10,000 as an advance on profits for which he was not entitled, another $2,000 for a rental payment in January 2008 that he was not entitled to receive, and $15,000 in unreimbursed personal expenses charged to his corporate credit card. But contrary to defendants' assertions, the evidence of damages was in dispute. With regard to plaintiff's credit card charges, there was evidence that defendants also charged personal expenses to IPAX for which they did not reimburse the corporation. Thus, the jury could have found that defendants were not entitled to damages because defendants incurred similar personal expenses. Further, with regard to the advances on IPAX's profits and the rental payments, the jury could have found that defendants were not entitled to damages because they increased their salaries and generated other corporate expenses to falsely portray IPAX as losing money. If the jury believed that defendants were misrepresenting IPAX's financial status to avoid paying plaintiff his share of the profits and rental payments, it could have found that defendants did not suffer any actual damages related to the value of their stock, that the stock was more valuable than defendants claimed, or that defendants had similarly benefited from the corporation. Accordingly, the trial court did not err in denying defendants' motion for additur.

III. MCL 450.1489

*4 Next, defendants argue that the trial court erred in finding that they violated MCL 450.1489 by engaging in willfully unfair and oppressive conduct. We review the trial court's findings of fact under the clearly erroneous standard. MCR 2.613(C); *King v. State*, 488 Mich. 208, ——; —— NW2d —— (2010). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Reed v. Reed*, 265 Mich.App 131, 150; 693 NW2d 825 (2005). The trial court's conclusions of law are reviewed de novo. *In re Capuzzi Estate*, 470 Mich. 399, 402; 684 NW2d 677 (2004).

MCL 450.1489 provides, in relevant part:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder....
>
> * * *
>
> (3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

The trial court found that defendants engaged in willfully unfair and oppressive conduct by (1) the way in which they eliminated plaintiff's salary and gave themselves raises, (2) terminating the rental payments to plaintiff that normally were made to all three directors, (3) issuing a capital call when the corporation was doing fairly well, which diluted plaintiff's stock and shares and forced plaintiff to put his own money into the corporation, and (4) engaging in other less oppressive actions with the intent to "squeeze Plaintiff out of the company rather than to give him his fair share of his investment."

We disagree with defendants' argument that the trial court erred in finding that they engaged in willfully unfair and oppressive conduct because their conduct was authorized by the corporation's bylaws. Although the bylaws gave

defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder. The exception in MCL 450.1489(3) cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants' general authority to run and manage IPAX.

*5 Further, the trial court did not clearly err in finding that defendants' use of their power as majority shareholders to pay themselves higher salaries, while at the same time claiming that the corporation was not profitable to justify their refusal to make any distributions to plaintiff, supported its determination that defendants engaged in willfully unfair and oppressive conduct. The evidence indicated that defendants' salaries were $64,000 in 2005, and $70,000 in 2006. Defendants claimed that the corporation began losing money in 2006, but their salaries were increased to $86,000 or $90,000 in 2007. Similarly, at the time of trial in 2008, defendants were receiving a biweekly salary of $3,500, the equivalent of an annual salary of $91,000.

Defendants also argue that plaintiff was not entitled to recover his salary or any rental payments he was due because those alleged losses were not attributable to his rights as a shareholder. However, defendants inappropriately rely on *Franchino v. Franchino,* 263 Mich.App 172, 182–186; 687 NW2d 620 (2004), for the proposition that MCL 450.1489 does not allow shareholders to recover if they are harmed in a capacity as an employee or board member. At the time *Franchino* was decided, MCL 450.1489(3) did not contain a provision addressing employment-related benefits to shareholders. MCL 450.1489(3) was amended by 2006 PA 68, effective March 20, 2006, to add the provision that "[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." Thus, MCL 450.1489(3) now allows a minority shareholder to claim willfully unfair and oppressive conduct as a result of reductions in salary or other employment benefits.

Defendants do not dispute that plaintiff's salary was cut and that plaintiff's rental payments from IPAX to API were stopped. Plaintiff was receiving those payments as a result of his status as a shareholder in this closely-held corporation, as well as the work he performed on the corporation's behalf. Yet, despite defendants' claims that IPAX was financially distressed and losing money, defendants increased their own salaries. The trial court did not clearly err in finding that defendants' conduct was designed to prevent IPAX from showing a profit that could be distributed to plaintiff as either rent or salary. There was also evidence that defendants refused to allow plaintiff to participate in corporate decisions beginning in 2006. Their conduct therefore affected plaintiff's rights, not only with regard to his employment, but also as a shareholder to participate in decisions affecting the corporation. Thus, defendants' actions affected plaintiff's interests as a shareholder.

Further, the jury's verdict did not preclude the trial court from finding that defendants violated MCL 450.1489 by refusing to pay plaintiff his salary or rent. The jury was asked to decide the limited issue whether there was an agreement to pay plaintiff $4,000 a month. The jury's finding that there was no contract did not foreclose the trial court from finding that defendants willfully engaged in unfair and oppressive conduct designed to manipulate IPAX's financial records to foreclose plaintiff's right to distributions as a shareholder.

*6 For these reasons, we find no err in the trial court's determination that defendants violated MCL 450.1489 by engaging in willfully unfair and oppressive conduct.

IV. REMEDIES

Defendants next challenge the various remedies fashioned by the trial court to remedy defendants' violation of MCL 450.1489. Defendants first challenge the following buyout option imposed by the court:

> FIRST, the court will require the Defendants, Alla and Paul Katz [sic] to value Plaintiff, Mr. Berger's stock, and then give Mr. Berger the option of either having his shares purchased by the Defendants at a set price by the Defendants, or be able to purchase the Defendants [sic] shares at twice the price they set. The Defendants are to determine the fair value of Mr. Berger's shares within 60 days of this order and then present him with the option.
>
> If for whatever reason neither side is able to buy the other side out within 90 days of this order the court orders that that [sic] a receiver be appointed to take control of the company, Cleanogel, Inc. to sell it and all of its assets. This also includes API, LLC ("API"), and IPAX China ("IPAXChina").

Defendants contend that although the trial court had the authority to require them to purchase plaintiff's shares of stock, it lacked the authority to provide plaintiff with the option of purchasing defendants' shares. MCL 450.1489(1) provides, in pertinent part:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. *If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:*
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
>
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
>
> (e) *The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.*
>
> (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first. [MCL 450.1489(1) (emphasis added.)]

*7 Contrary to defendants' argument, MCL 450.1489(1) does not limit a buyout option to the purchase of a prevailing shareholder's shares. Although that option is permitted by MCL 450.1489(1)(e), the statute authorizes a trial court to "make an order or grant relief as it considers appropriate, including, *without limitation,* an order providing for any of the following...." MCL 450.1489(1). Thus, the statute gives a trial court broad discretion in deciding an appropriate remedy, and those remedies are not limited to those listed in MCL 450.1489(1)(a)-(f).

We also find no merit to defendants' argument that plaintiff's poor health made it inappropriate for the trial court to provide plaintiff with the option of purchasing defendants' shares. Contrary to defendants' assertions, that option did not require plaintiff to be involved in the day-to-day operations of the company. It merely addressed ownership of the corporation.

Defendants also argue that the trial court lacked the authority to appoint a receiver for IPAX, because IPAX was not a party to this lawsuit. This argument is directed at the following provision in the trial court's judgment:

> If for whatever reason neither side is able to buy the other side out within 90 days of this order the court orders that that [sic] a receiver be appointed to take control of the company, Cleanogel, Inc. to sell it and all of its assets. This also includes API, LLC ("API"), and IPAX China ("IPAXChina").

We agree that the trial court could not appoint a receiver for the corporation without the corporation being added as a party to this lawsuit. See *Shouneyia v. Shouneyia,* —— Mich.App ——; —— NW2d —— (Docket No. 297007, issued January 18, 2011), slip op 3–5. However, the trial court imposed the receivership option as a contingent remedy, one that had not yet materialized. The trial court's judgment did not purport to actually appoint a receiver, but rather provided that appointment of a receiver to liquidate the corporation would be available as a contingent remedy if the buyout option was not feasible. Thus, it was not necessary to add IPAX as a party, because no receiver had yet been appointed. In the event it becomes necessary to appoint a receiver, the corporation can be added as a party at that time. See *Shouneyia,* slip op at 3–4.

Furthermore, we disagree with defendants' argument that the contingent remedy of receivership was not factually appropriate. The "dissolution and liquidation of the assets and business of the corporation" is one of the available remedies specified in MCL 450.1489(1)(a). Liquidation

seems especially appropriate in this case given that IPAX is a closely-held corporation and that all of the shareholders of IPAX are parties to this action. Although defendants assert that liquidation is not necessary because IPAX would be able to continue to operate, the evidence showed that IPAX was being operated to benefit defendants, who attempted to shut plaintiff out. The parties thereafter attempted to resolve their differences through an interim arrangement, but they were unable to reach a final agreement. Without a buyout, it was not feasible for IPAX to continue to operate as a going concern.

*8 Defendants next argue that the trial court erred by ordering them "to reimburse the corporation the amount of legal fees and costs that the corporation paid out for Defendants [sic] willful misconduct in this case." Defendants contend that this remedy was improper because the corporation's bylaws specifically permitted the corporation to indemnify defendants for their legal expenses. The bylaws provide that the corporation shall indemnify officers and directors for any legal expenses incurred in their capacity as an officer or director, but further provide that "[t]he corporation shall not, however, indemnify such director or officer with respect to matters as to which he shall be liable for wilful misconduct in the performance of his duties as such director or officer." The bylaws are consistent with MCL 450.1561, which provides, in pertinent part:

> A corporation has the power to indemnify a person who was or is a party or is threatened to be made a party to a threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal, other than an action by or in the right of the corporation, by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation, ... including attorneys' fees, ... if the person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders....

In this case, the jury found that defendants breached their fiduciary duties to plaintiff as a minority shareholder, and the trial court found that defendants engaged in willfully unfair and oppressive conduct against plaintiff as a minority shareholder. These findings are inconsistent with defendants' contentions that they acted in good faith. On the contrary, they support the trial court's finding of willful misconduct that precludes indemnification under both the corporation's bylaws and MCL 450.1561.

We also reject defendants' argument that the reimbursement provision effectively requires them to pay the cost of their legal expenses twice, because they previously loaned funds to IPAX that IPAX in turn used to pay their legal costs in this action. Although there was evidence that defendants had loaned funds to IPAX, the evidence did not show that the loaned funds were used exclusively to pay the cost of defendants' legal expenses. Regardless, to the extent defendants loaned funds to IPAX, defendants would be permitted to seek repayment of those loans from IPAX. Thus, the trial court's judgment does not require defendants to effectively pay twice for the cost of their legal expenses.

Defendants also argue that it was improper for the trial court to enter an interim order requiring that plaintiff be paid $2,000 a month and other benefits until IPAX changes hands or is sold. Defendants contend that the trial court could not properly order IPAX to make monthly payments because IPAX was not a party to this case, and further, because IPAX is insolvent. However, the trial court's interim order does not impose any obligation on IPAX directly. Rather, it directs that "Plaintiff be paid $2,000 a month along with his health insurance and other benefits until the corporation finally changes hands completely to Plaintiff or Defendants or until the corporation is sold." Because this case concerned the shareholders' control over the corporation and all shareholders in the corporation were parties to this action, the trial court's order was not improper. Further, the record does not support defendants' argument that IPAX is insolvent. Although defendants testified at trial that IPAX was no longer profitable, there was also testimony that IPAX held other assets and real property, including lakefront property. There was no testimony that it was insolvent. Further, if IPAX believes that it is unable to comply with the trial court's order because of its financial condition, it can file an appropriate motion to intervene and seek relief from the trial court's order.

V. PLAINTIFF'S DEPOSITION TESTIMONY

*9 Defendants finally argue that the trial court erred in allowing portions of plaintiff's deposition testimony to be introduced on redirect examination. Defendants contend that

the evidence was inadmissible hearsay. Because defendants did not raise a hearsay objection in the trial court, this issue is not preserved. *City of Westland v. Okopski*, 208 Mich.App 66, 72; 527 NW2d 780 (1994). An unpreserved claim of evidentiary error is subject to review for plain error affecting a party's substantial rights. MRE 103(d); *Kern v. Blethen–Coluni*, 240 Mich.App 333, 336; 612 NW2d 838 (2000).

The record discloses that the challenged testimony was offered to rebut defendants' suggestions that plaintiff's trial testimony was recently fabricated or the result of improper influence or motive. MRE 801(d)(1)(B) expressly provides that such statements are not hearsay. Accordingly, there was no plain error.

VI. CASE EVALUATION SANCTIONS

In his appeal in Docket No. 293880, plaintiff argues that the trial court erred in denying his motion for case evaluation sanctions. A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v. Hazen*, 242 Mich.App 374, 376–377; 619 NW2d 1 (2000).

Plaintiff/counter-defendant's claims and defendants/counter-plaintiff's counterclaim were submitted to case evaluation and resulted in a net award of $50,000 in favor of plaintiff/counter-defendant. Plaintiff/counter-defendant received an award of $75,000 against defendants/counter-plaintiffs. Defendants/counter-plaintiffs received an award against plaintiff/counter-defendant in the amount of $25,000. Plaintiff/counter-defendant accepted the awards and defendants/counter-plaintiffs rejected them. Plaintiff argues, and we agree, that the trial court erred by viewing the net award of $50,000 as a separate award for each defendant, to be measured by the jury's verdict of $22,000 against each defendant. The case evaluation panel's award clearly indicates that a net $50,000 award encompassed plaintiff's claims against both defendants. Therefore, it is appropriate to view the jury's separate verdicts of $22,000 against each defendant as a total verdict of $44,000 for purposes of determining defendants' liability for case evaluation sanctions.[2] To avoid liability for case evaluation sanctions, defendants were required to improve their position by more than ten percent after adjustment of the jury's verdict. MCR 2.403(O)(3). Thus, because the net case evaluation award was for $50,000, defendants could avoid liability for case evaluation sanctions only if the adjusted verdict was less than $45,000. Appropriate adjustments include assessable costs and statutory interest. MCR 2.403(O)(3). Plaintiff represented below, and defendants did not dispute, that statutory interest alone exceeded $3,000, which when added to the $44,000 jury verdicts, results in an adjusted verdict in excess of the $45,000 amount necessary to trigger liability for case evaluation sanctions. Therefore, the trial court erred in denying plaintiff's motion for case evaluation sanctions.[3]

*10 We must also note that counter-plaintiffs did not better their position. To avoid liability for case evaluation sanctions, counter-plaintiffs were required to improve their position by more than ten percent after adjustment of the jury's verdict. MCR 2.403(O)(3). They did not, and they were liable for case evaluation sanctions to counter-defendant as well. First, case evaluation is mandatory. MCR 2.403(A)(2). The purpose of mandatory case evaluation is to encourage the parties to settle, settlement being the preferred manner of resolution dispute. While the dissent would forego case evaluation sanctions to plaintiff for failure to object to a unitary award in violation of MCR 2.403(K)(2), in our view such an application works an injustice and defeats the policy in support of mandatory case evaluation. Second, the dissent does not accord plaintiff as the counter-defendant sanctions on the successful completion of that portion of the litigation and for which there is no case evaluation award inconsistency. The conclusion offered by the dissent results in forfeiture. It is clear that neither of the parties sought to reform the award, set the award aside, or sought other intervention by the trial court. To deprive plaintiff of sanctions as either a plaintiff or counter-defendant works an injustice that is cured by treating the failures of the parties to rely on MCR 2.403(K)(2) as a waiver. Treating the parties' avoidance of MCR 2.403(K)(2) as a waiver additionally supports the policy of mandatory case evaluation. Accordingly, we reverse the order denying case evaluation sanctions and remand for a determination of sanctions under MCR 2.403(O).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

WILDER, P.J. (dissenting in part).

*10 I respectfully dissent from part VI of the Court's opinion awarding case evaluation sanctions to plaintiff.

In this case, as the majority opinion concedes, the case evaluation panel disregarded MCR 2.403(K)(2) when it issued one award for plaintiff's claims against both defendants. Plaintiff did not object, however, and therefore, the trial court correctly interpreted the award in accordance with the court rule, finding that there was a net award of $50,000 against *each* defendant. The trial court then compared these awards to the jury verdict of $22,000 against each defendant pursuant to MCR 2.403(O)(4)(a), which clearly prohibits aggregating an award: "in determining whether the verdict is more favorable to a party than the case evaluation, the court *shall* consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties." (Emphasis added.) When construing a court rule, the word "shall" indicates a mandatory provision. *Howard v. Bouwman*, 251 Mich.App 136, 145; 650 NW2d 114 (2002).

***11** Furthermore, in my judgment, consideration of whether defendants, as counter-plaintiffs, bettered their position is not warranted. While courts are prohibited from aggregating mediation awards amongst *multiple defendants*, courts must aggregate the awards stemming from claims and counter-claims amongst *particular pairs of parties*. MCR 2.403(O)(4)(a); see also *Minority Earth Movers, Inc. v. Walter Toebe Const. Co.*, 251 Mich.App 87, 94; 649 NW2d 397 (2002) ("[M]ediation evaluations on a claim and counterclaim are to be treated as a whole for purposes of acceptance or rejection."). Under the applicable case law and court rule, then, it is inappropriate to view in isolation only one side's award from a claim or counter-claim. Instead, a court is required to consider a plaintiff's aggregate award against each particular defendant. Here, for the reasons stated above, the mediation panel is considered to have awarded plaintiff a net amount of $50,000 against Alla Katz. Because the jury verdict only awarded plaintiff $22,000 against Alla, plaintiff is not entitled to sanctions against Alla. Likewise, because the mediation panel awarded plaintiff $50,000 against Paul Katz and the jury only awarded $22,000, plaintiff is not entitled to sanctions against Paul either.

Finally, I disagree with the majority's conclusion that defendants waived or forfeited [1] their right to have MCR 2.403(O)(4)(a) enforced because *they* did not object to the form of the mediation award. As noted earlier, neither plaintiff nor defendants objected to the mediation award's form. *Any* party that fails to make such an objection may not later seek to view the award contrary to the plain language of MCR 2.403(O)(4)(a). Cf. *Roberts v. Mecosta Co. General Hosp.*, 466 Mich. 57, 64–67; 642 NW2d 663 (2002) (the failure of the defendant in a medical malpractice case to object to the adequacy of the plaintiff's notice of intent did not constitute a waiver of the notice's requirements that were listed in the plain language of the statute). Thus, in my judgment, plaintiff forfeited the ability to have the $50,000 mediation award treated as anything other than $50,000 against each defendant when he failed to object to its form.

Footnotes

1 Throughout the bulk of our opinion we refer to plaintiff/counter-defendant merely as "plaintiff," and defendants/counter-plaintiffs merely as "defendants" for the sake of efficiency. However, with regard to our discussion of Case Evaluation Sanctions, for the sake of clarity, where necessary, we use their designations as counter parties.

2 Although MCR 2.403(K)(2) indicates that the case evaluation panel should have issued separate awards for plaintiff's claims against each defendant, the award that was issued cannot be interpreted as separate awards. To the extent the rule was not followed, or defendants desired separate awards, it was incumbent on them to raise the issue in an appropriate motion in the trial court. Because they failed to do so, they may not now complain that MCR 2.403(K)(2) was not followed.

3 Because the jury verdicts, as adjusted, alone establish defendants' liability for case evaluation sanctions, it is unnecessary to consider the effect of the remaining relief awarded by the trial court for defendants' violation of MCL 450.1489.

1 Because waiver is the "intentional relinquishment or abandonment of a known right" and the parties appeared to have done nothing other than fail to object to the manner of the mediation award, their actions are more akin to forfeiture, which is merely the failure to object. *People v. Carines*, 460 Mich. 750, 763 n. 7; 597 NW2d 130 (1999).

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E.D. Michigan,
Southern Division.

Joseph C. BROMLEY, Joseph V. Clemente, and Dean J. Clemente, individually and as directors of National Semi-Trailer Corp., a Michigan corporation; Renee Suchara, and individual; Omni Ventures, Inc., A Michigan corporation, and Churchill Trailers, Inc., a Michigan corporation, Plaintiffs,

v.

Randall BROMLEY, individually and as Trustee of The Randall Bromley First Amended and Restated Revocable Living Trust, John Verdon and Scott Mackey, individually and in their capacity as officers and directors of National Semi-Trailer Corp., a Michigan Corporation; Joseph C. Bromley, II as an officer and direction of National Semi-Trailer Corp., Defendants.

No. 05-71798. | Sept. 28, 2006. | Oct. 4, 2006.

Attorneys and Law Firms

Gregory P. DeGraff, Martin J. Leavitt, Paul E. Robinson, Sullivan & Leavitt, Northville, MI, for Plaintiffs.

Daniel F. Berry, Howard & Howard, Detroit, MI, Mary C. Dirkes, Matthew B. Woodworth, Howard & Howard, Bloomfield Hills, MI, for Defendants.

Opinion

OPINION AND ORDER

LAWRENCE P. ZATKOFF, District Judge.

I. INTRODUCTION

*1 This matter is presently before the Court upon Plaintiffs' Motion for a Preliminary Injunction. The preliminary injunction hearing was held on September 28, 2006. For the reasons set forth below, Plaintiffs' motion will be GRANTED.

II. BACKGROUND

Plaintiffs filed their complaint in state court on April 1, 2005, in their individual capacities, and as directors and shareholders of National Semi-Trailer Corp ("National"). Plaintiffs all reside in Michigan and National is a Michigan corporation in the business of leasing semi-trailers for use in interstate commerce. By their Complaint, Plaintiffs have asserted claims for minority shareholder oppression, removal of directors, accounting, inspection of records, and conspiracy. In essence, Plaintiffs object to a number of expenses National has incurred on Defendants' behalf and object to the way Defendants are managing National. Defendants removed the case to federal court based on diversity of citizenship. A bench trial is scheduled for May 2007.

In their current motion, Plaintiffs seek to enjoin Defendants from taking action pursuant to a number of recent amendments to National's bylaws, which they claim Defendants could use to oppress them as minority shareholders. Among the objectionable provisions, which are covered below, are sections regarding attendance at shareholder's meetings, proxies, issuance of stock and other rights in National, directors' duties, ratification of conflicted transactions, and indemnity.

A. Randall Bromley

Defendant Randall Bromley, as the Trustee of the Randall Bromley First Amended and Revocable Living Trust and sole shareholder of NST Corp. III ("NST"), owns the majority of the voting stock in National, and is the central figure in this litigation. Plaintiffs allege that Randall Bromley, as the majority shareholder and as a director of National, controls the corporation and the other directors, and has used his position for his own personal gain. Plaintiffs contend that Randall Bromley has been joined in this abuse of power by the other named Defendants, and a National employee, Rick Purvis,[1] who Randall Bromley hired as National's corporate pilot.

Essentially, Randall Bromley is National. As the controlling shareholder and CEO, he dictates corporate action. Moreover, the governing documents permit him to act unilaterally, with no checks on his power and without notice to other shareholders. For example, National's bylaws provided that they could be amended upon the affirmative vote of those

shareholders holding a majority of the stock entitled to vote, i.e. Randall Bromley. Further, such action could be taken without a meeting, without prior notice, and without a vote if all of the shareholders consented, unless a lesser number is permitted by the articles of incorporation. Not surprisingly, National's articles of incorporation only required the consent of a majority of the shareholders entitled to vote, i.e. Randall Bromley, to waive the meeting, notice, and voting provisions. In other words, Randall Bromley, as the majority shareholder, was able to waive all notice, meeting and voting requirements, and amend National's bylaws as he saw fit. His position as the majority shareholder made it possible for other corporate action as well, including electing directors and entering into commercial transactions.

*2 In 1998, National's directors approved a $300,000 base salary for Randall Bromley and certain incentives tied to corporate performance. According to corporate records, National did not meet the specified level of performance for the years 2001, 2002, and 2003. However, in May 2005, the board of directors, upon Randall Bromley's request, ratified all corporate salaries for the previous five years, which allegedly included unearned bonuses. Another of the salaries was that of Rick Purvis, the corporate pilot. Mr. Purvis had been hired by Randall Bromley, despite having never flown an airplane. Further, so that Mr. Purvis could fulfill his duties as the corporate pilot, National paid for his flight training and pilot's license.

Plaintiffs allege Randall Bromley engaged in numerous other abuses of his majority and control position. One area of concern for Plaintiffs involved Randall Bromley's personal use of corporate assets, including club memberships, automobiles, homes, and the corporate jet. Plaintiffs allege that Randall Bromley used corporate memberships at various country clubs and resorts for personal, rather than business purposes. Plaintiffs also questioned Defendants' trips to the Carribean using the corporate jet, specifically to locations where National did no business. Finally, National leased a corporate residence in Orlando to Randall Bromley that was previously used solely for business purposes.

Defendants' questionable conduct also allegedly extends to their other businesses. As part of its business, National operates several branch locations throughout the eastern United States. Plaintiffs allege that Randall Bromley used these locations to enter into self-interested transactions. National's lease for its Ellenwood, Georgia, branch contained an option to purchase the property for $775,000. According to an appraisal, the land was worth $910,000. National did not exercise its option to purchase the land; however, the property was eventually purchased by Transland Holdings, LLC ("Transland"),[2] which leased the property back to National. Coincidentally, Mr. Bromley and two other Defendants own interests in Transland. A similar transaction involved National's Memphis branch, where National passed on an option to purchase property valued at $775,000 for $325,000. Again, Transland purchased the underlying property and leased it back to National.

Furthermore, another of National's landlords, NST, of which Randall Bromley is the sole shareholder, has increased National's rent at several other branches beyond the consumer price index contrary to the leases, in one instance raising the rent by 33%. Additionally, National has made numerous loans to NST, which has carried a balance as high as $900,000.

B. Unpaid Dividends

In 2003, National ceased paying dividends on preferred stock as a result of debt refinancing. As a condition of the refinancing, National agreed to refrain from paying distributions without lender approval. As provided in National's articles of incorporation, its preferred stock is the only class which is entitled to dividends. At the time of the refinancing, Plaintiffs were the only shareholders who owned preferred stock. Consequently, Plaintiffs were the only shareholders impacted by National's failure to pay dividends. Furthermore, Plaintiffs' allege that undisclosed dividends were paid to other shareholders, corporate books were misstated to hide misappropriation of corporate assets, and that Defendants denied Plaintiffs access to corporate records. Defendants deny these allegations and have presented evidence to the contrary.

C. Ejection of Plaintiffs from National's Board of Directors

*3 In April 2005, National's board consisted of seven directors, including Plaintiffs. After the lawsuit began, Randall Bromley, as majority shareholder caused the bylaws to be amended to decrease the number of directors from seven to four, thereby excluding Plaintiffs. One month after he removed Plaintiffs, Randall Bromley proposed that National's bylaws be amended. One of the proposed amendments increased the number of directors from four back to seven. As majority shareholder, Randall Bromley approved these bylaws in December 2005, and caused the board of directors to do the same. As a result, Randall Bromley, as majority

shareholder was then able to elect three directors of his choice to replace Plaintiffs on the board.

D. Amended Bylaws

National's bylaws were first adopted in 1989 ("1989 bylaws") and had not been amended since. According to minutes at the director's meeting held on May 15, 2005, the amendments were necessary to conform to the Michigan Business Corporation Act ("the Act"), and to address subjects not covered in the 1989 bylaws. Using the procedure discussed above, Randall Bromley amended National's bylaws.

The amended bylaws affected Plaintiffs in a number of ways. First, the amended bylaws changed the attendance policy for shareholder's meetings, requiring in-person attendance only and preventing Plaintiffs from participating via telephone. Second, the amended bylaws allow meetings to be adjourned without providing notice to persons not in attendance. Third, the amended bylaws allow National to notify its shareholders of upcoming meetings ten days before the scheduled date, which is also the same day shareholders must tender their proxies to the corporate secretary. Fourth, as stated above, the amended bylaws increased the number of directors from four to seven. Fifth, the amended bylaws provide that self-interested transactions by directors can be ratified by a vote of disinterested directors or shareholders. Sixth, the amended bylaws allow National to issue stock as payment for promises to provide services evidenced by a written contract. Seventh, the amended bylaws allow for National to issue promissory notes as dividends. Eighth, the amended bylaws allow National's directors to issue options and warrants for National's stock. Finally, the amended bylaws provide for the indemnification of parties affiliated with National in the event of litigation. These changes became effective on December 20, 2005.

III. LEGAL STANDARD

Regarding preliminary injunctions, the Sixth Circuit has held that:

> To determine whether to grant a preliminary injunction, a district court must consider:
>
> (1) the plaintiffs' likelihood of success on the merits;
>
> (2) whether the plaintiff may suffer irreparable harm absent the injunction;
>
> (3) whether granting the injunction will cause substantial harm to others; and
>
> (4) the impact of an injunction upon the public interest.
>
> None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them.

*4 *Abney v. Amgen, Inc.*, 443 F.3d 540, 547 (6th Cir.2006) (citations omitted). These four criteria simply guide the discretion of the court and are meant to serve as factors to be balanced, rather than rigid and unbending requirements to be met in every case. *See Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir.2003); *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir.2001). A stronger showing of likelihood of success is required as the other factors militate against granting relief, but less likelihood of success is required when they do support granting relief. *Performance Unlimited, Inc. v. Questar Publ'rs, Inc.*, 52 F.3d 1373, 1385-86 (6th Cir.1995).

IV. ANALYSIS

A. Plaintiffs' Likelihood of Success on the Merits

Plaintiffs' cause of action is based on several counts. The crux of Plaintiffs' case is count I, alleging oppressive conduct by the majority shareholders under MICH. COMP. LAWS § 450.1489.

1. Minority Opression

The Michigan Business Corporation Act provides that:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.

(b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

(c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.

(d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

(e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

* * * *

(3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

MICH. COMP. LAWS § 450.1489.[3] Accordingly, to succeed on this claim, Plaintiffs must demonstrate that Defendants' conduct was "illegal, fraudulent, or willfully unfair and oppressive" such that it interfered with Plaintiffs' rights as shareholders. *Id.* The Michigan court of appeals clarified the meaning of shareholder's rights, stating "[s]hareholder's rights are typically considered to include voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends." *Franchino v. Franchino*, 263 Mich.App. 172, 184 (2004).

*5 Michigan courts have consistently held that the purpose of § 450.1489 is to protect minority shareholders, particularly in close corporations, from overreaching and heavy handed actions by the majority. *See Estes v. Idea Engineering & Fabrications*, 250 Mich.App. 270, 284 (2002) (citing an amicus brief filed by the Corporation Law Committee of the Business Law Section of the State Bar of Michigan). Furthermore, the provisions of the Act should be liberally construed to "give special recognition to the legitimate needs of close corporations." MICH. COMP. LAWS § 450.1103. When addressing such claims, the *focus is on the majority's conduct*, rather than the minority's expectations. *See Franchino*, 263 Mich.App. at 188 (emphasis added). Finally, "a shareholder who would be likely to prevail under this statute is one who presented an *ongoing pattern of oppressive misconduct.*" *Estes*, 250 Mich.App. at 281 (emphasis added).

The court in *Estes*, adopting Judge Hoekstra's characterization of the relationship between shareholders in a close corporation, recognized a higher standard of fiduciary duties between majority and minority shareholders. *See Estes*, 250 Mich. .App. at 281. Judge Hoekstra stated

> [T]he relationship among those in control of a closely held corporation requires a higher standard of fiduciary responsibility, a standard more akin to partnership law. The Legislature highlighted this special duty of care in the language of § 489(1) when it chose the words "illegal, fraudulent, or willfully unfair and oppressive" to describe the acts of the defendants.

Id. at 281 (internal citations omitted). Moreover, Michigan courts have historically held such shareholders to a higher degree of fiduciary duties, stating "[t]he law requires of the majority the utmost good faith in the control and management of the corporation as to the minority, and it is the essence of this trust that it must be so managed as to produce to each stockholder the best possible return upon his investment." *Vesser v. Robinson Hotel Co.*, 275 Mich. 133, 138 (1936).

This view is reasonable in light of the statutory directive to liberally construe the Act to better serve the unique needs of close corporations, and the distinct standard of care the majority owes to the minority provided for in § 450.1489. *See Estes*, 250 Mich.App. at 278. Therefore, it is reasonable to conclude that the type of conduct amounting to a breach of fiduciary duties in close corporations is the type of conduct prohibited by § 450.1489. Examples of such conduct include investments deemed not to be in the corporation's best interest, denying access to corporate books and records, diverting corporate opportunities and assets to other entities, removing minority shareholders from positions in management, refusing to declare dividends, and diluting minority equity interests. *See* 19 AM.JUR. 2d *Corporations* § 2372 (citing cases from numerous jurisdictions). *See also* 1 O'NEAL & THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 3.11. It is also clear that conduct need not be illegal or fraudulent to be willfully unfair and oppressive under § 450.1489. *See Moore v. Carney*, 84 Mich.App. 399 (1978). Thus, actions that may

be permissible under the Act may nevertheless constitute willfully unfair and oppressive acts towards the minority.

2. Oppression in the Present Case

*6 The record in the case thus far reveals ample evidence of unfair and oppressive conduct. In his position as majority shareholder, Randall Bromley has caused National to expend exorbitant amounts of money in transactions to which he had an interest. Further, Mr. Bromley has superficially ratified these deals as the majority shareholder. Most importantly, however, Mr. Bromley, making use of National's favorable governing documents, ejected Plaintiffs from National's board of directors and amended National's bylaws after this lawsuit began. The substance of the bylaw amendments sheds light on the merit of Plaintiffs' claims. Particularly troubling are the amendments relating to attendance at shareholder meetings, proxy voting, ratification of conflicted transactions, and indemnification of corporate affiliates. While Defendants maintain that the amended bylaws simply track the provisions of the Michigan statute, this is not entirely correct, and the circumstances surrounding the amendments look suspiciously like a corporate freeze-out.

First, requiring in-person attendance at shareholder's meetings is legal and Defendants claim the change was made to protect corporate information. *See* MICH. COMP. LAWS § 450.1405. Likewise, the provisions allowing adjournments without providing notice is also legal. *See* MICH. COMP. LAWS § 450.1404. Further, Defendants maintain that the proxy provisions were added to provide guidance on proxy procedures since the 1989 bylaws did not contain like provisions. Yet in-person attendance at meetings requires Plaintiffs to travel from Michigan to Florida on ten days notice. Therefore, notice of a shareholder meeting could be given on the same day proxy notices would be due with the corporate secretary. Moreover, Defendants would not be required to give notice of adjourned meetings to those persons who did not attend in-person. When read together and in light of the timing and other circumstances of the case, the amendments give the appearance that Defendants are using their majority and control position to keep Plaintiffs out of corporate affairs. Individually, the amendments are legal, yet collectively they could be used oppressively. This substantially affects Plaintiffs' rights as shareholders.

Second, the amended bylaws make it possible for interested shareholders to ratify transactions where a director has a conflict of interest. While the language appears to be the same as the statute, the amended bylaw provision does not contain the full language of the statutory provision. The statute allows disinterested shareholders to ratify conflicted transactions. *See* MICH. COMP. LAWS § 450.1545a(3). The statute provides that "a transaction is authorized, approved, or ratified if it receives the majority of votes cast by the holders of shares *who did not have an interest in the transaction.*" *Id.* (emphasis added). In contrast, the amended bylaws specifically allow interested shareholders to ratify conflicted transactions, stating that a conflicted transaction could be ratified if it is disclosed to "a majority of the shareholders (*irregardless [sic] of interest or disinterest*) entitled to vote and they authorize, approve or ratify such contract or transaction by majority vote or written consent...." Restated Bylaws 2.11(b) (emphasis added). Thus, Randall Bromley, in his capacity as majority shareholder, could ratify transactions despite his interest. Accordingly, National's dealings with Randall Bromley, including his leased home and the leases with his other corporations, could be easily ratified by interested shareholders at the minority's expense.

*7 Third, the amended bylaws would allow the corporation to indemnify affiliates of the corporation for losses incurred due to lawsuits. The bylaws' definition of affiliate appears tailored specifically to Defendants' other corporations: "An affiliate shall include ... any entity formed by officers, employees, Directors, or shareholders of the Corporation [National] to own assets leased to the Corporation [National]." Restated Bylaws 9.01. This provision goes beyond the statutory indemnification provision in that the statute does not allow indemnification for persons or entities who are not agents of National. *See* MICH. COMP. LAWS § 450.1561.

Finally, the amended bylaws increase the number of directors from four to seven. This amendment appears innocuous on its own, but in context it is disturbing. At one time, National had seven directors, three of whom are Plaintiffs in the current action. Following the commencement of this action, the bylaws were amended to decrease that number from seven to four, excluding Plaintiffs. Now the bylaws have been amended again, according to Defendants to add three independent business people to the board. However, the timing of this change in management, combined with the other amendments to the bylaws, closely resembles tactics in a classic freeze-out attempt. Defendants have removed Plaintiffs from management positions, made it more difficult for them to exercise rights as shareholders, siphoned corporate assets to other organizations which they own, and hindered access to corporate books and information. After

hearing the parties' arguments and reviewing their briefs and other documents, the Court concludes that Plaintiffs have demonstrated a strong likelihood of success on the merits.

B. Irreparable Harm to Plaintiffs Absent an Injunction

Plaintiffs argue that they will be irreparably harmed if an injunction is not issued. Plaintiffs assert they will be harmed in that the amended bylaws make it possible for Defendants to hinder their voting rights, dilute Plaintiffs' equity interest in National and act without regard to their fiduciary duties while simultaneously indemnifying themselves for any asserted breach.

Defendants respond that Plaintiffs' claims of irreparable harm are purely speculative. Principally, Defendants argue that the amended bylaws were duly enacted and comply with the Michigan Business Corporation Act. Additionally, Defendants point out that if any harm was irreparable, Plaintiffs would not have waited more than six months after the effective date of the amended bylaws to seek injunctive relief.

A party's injury is considered irreparable if it is not fully compensable by money damages. *See Performance Unlimited, Inc.*, 52 F.3d at 1382; *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992). Mere injuries, no matter how substantial, in terms of money, time, and energy necessarily expended to comply with an injunction are not enough to show irreparable injury. *See United States v. Edward Rose & Sons*, 384 F.3d 258, 264 (6th Cir.2004). Likewise, a party's harm is not fully compensable if the nature of the loss would make damages difficult to calculate, as is the case with the loss of goodwill or breach of a covenant not to compete. *See Basicomputer Corp.*, 973 F.2d at 511-12. Conversely, "the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir.1991).

*8 A party seeking an injunction must demonstrate more than an unfounded fear of harm; rather, there must be a showing that the asserted harm is likely to occur. *See* 11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (1995). While a party need not show that a harm is certain to occur, there must be a showing of a substantial threat of harm. *See id.; Michigan Coalition*, 945 F.2d at 153 (stating "the harm alleged must be both certain and immediate, rather than speculative or theoretical").

In this case, Plaintiffs have given numerous examples of how Defendants could act to harm them under the amended bylaws. Notably, Defendants' actions taken prior to amending the bylaws, specifically removing Plaintiffs from National's board of directors, have put Defendants in a position to oppress Plaintiffs and render their investments in National worthless. With no dissenting view on the board of directors, the amended bylaws would allow Defendants to severely dilute Plaintiffs' equity interest in National. Based on counsel's representations at oral argument, Defendants could issue stock, options, and warrants, at their discretion and to people of their choosing, leaving Plaintiffs' original investment a fraction of its original worth.

This harm cannot be easily calculated, nor could it be remedied. While it may be possible to calculate the difference in value between Plaintiffs' equity now and some value in the future, the value of Plaintiffs' loss of control and input in the management of National, in which they invested substantial sums of money, cannot be appraised. Furthermore, if Defendants were to issue stocks or other equity interests, the Court would be required to cancel countless transactions with potentially innocent third parties and force them to sell back the equity in order to return Plaintiffs' to the status quo. This would present an undesirable and unmanageable task.

Defendants still argue that Plaintiffs' fears are speculative. The Court is not persuaded. Based on the record so far, there is ample evidence justifying Plaintiffs' concerns. Defendants also state that Plaintiffs admitted that no harm is likely while the case is pending before the Court. However, Defendants fail to see the significance of their own actions to date. While this case was pending, Defendants removed Plaintiffs from the board of directors in order to insert friendly members and amended National's bylaws. If Defendants were willing to take such action under the Court's supervision, it is not unlikely that they would be willing to take additional adverse actions against Plaintiffs. Consequently, Plaintiffs' fear is not unfounded or mere speculation; rather, it is concrete and an injunction is proper to prevent further harm to Plaintiffs until a trial on the merits.

C. Burden on Defendants if Injunctive Relief is Granted

When deciding whether or not to issue an injunction, the Court must compare the burden on Plaintiffs if an injunction is not issued to the burden on Defendant if an injunction is

issued. *See* 11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.2. When this comparison is made, this factor favors Plaintiffs. Defendants have not presented any evidence to demonstrate that they will be significantly burdened if the Court issues an injunction.

*9 Conceivably, Defendants' business could be harmed if its directors are not permitted to act with the full authority provided by their bylaws. However, the Court fails to see how Defendants will be burdened by conducting business under bylaws they used for sixteen years. Defendants claim it will be burdensome for corporate officials to become reacquainted with the 1989 bylaws. This argument lacks merit. National's directors are sufficiently familiar with the 1989 bylaws, which they used until December 2005, and are fully capable of acting under those bylaws until trial in May 2007. Accordingly, the Court finds that Defendants will not be significantly burdened if an injunction is issued.

D. Impact of an Injunction upon the Public Interest

The Court must also consider the impact an injunction may have on the public interest. By preventing Defendants from acting under the amended bylaws, the Court will ensure that directors and majority shareholders in close corporations abide by their fiduciary duties to the minority shareholders. On the other hand, the Court should ordinarily not interfere with corporate decision making. Thus, it could be argued that the Court should refrain from preliminarily enjoining corporate directors from acting under properly enacted bylaws. This result would facilitate corporate decision making and thereby promote business and economic interests.

Nevertheless, the balance of the public interest in this case weighs in favor of Plaintiffs. National is a close corporation and such corporations have received special treatment under Michigan law. Michigan's public policy discourages oppressive and unfair actions in close corporations, which may be accomplished by technically legal means. Furthermore, § 450.1489 specifically grants the Court authority to intervene in the inner workings of a corporation to remedy oppressive conduct. Based on the fact that the public interest favors enforcing fiduciary duties, and the fact that the Michigan legislature has acted with close corporations in mind, the public interest weighs in favor of issuing an injunction.

E. Bond

Plaintiffs contend that the Court should not require a bond in this case because they have demonstrated a strong likelihood of success on the merits. Defendants argue otherwise. Neither party has made a suggestion as to a bond amount. The Sixth Circuit allows the district court discretion on the issue of bond. *See Moltan Co. v. Eagle-Picher Industries*, 55 F.3d 1171, 1176 (6th Cir.1995). In light of the Court's findings that Plaintiffs have a substantial likelihood of succeeding on the merits and that Defendants would not be significantly burdened by the injunction, the Court concludes that a bond is not necessary in this case.

V. CONCLUSION

After hearing the parties' arguments and weighing the traditional factors for granting or denying a preliminary injunction, the Court concludes that Plaintiffs are entitled to injunctive relief. The Court is satisfied that Plaintiffs have shown a strong likelihood of success on the merits and a sufficient threat of irreparable harm if an injunction is not issued. Finally, the Court finds that Defendants will not be substantially burdened if an injunction is issued and that the public interest will be served by enjoining further action under National's amended bylaws. Accordingly, Plaintiffs' Motion for a Preliminary Injunction is GRANTED. The Court HEREBY ORDERS that Defendants are hereby enjoined

*10 (i) From requiring shareholders to appear in-person at annual or special shareholder's meeting pursuant to Sections 1.01 and 1.02 of the Restated Bylaws.

(ii) From adjourning annual or special shareholder's meetings without providing notice to those shareholders not in attendance under Section 1.05 of the Restated Bylaws.

(iii) From requiring proxies to be tendered to the Corporate secretary no later than 10 days prior to any annual or special shareholder's meeting under Section 1.10 of the Restated Bylaws.

(iv) From acting inconsistently with the duties of Directors as stated in MICH. COMP. LAWS § 450.1541 under Section 2.04 of the Restated Bylaws, including actions as a committee under Section 2.12 of the Restated Bylaws.

(v) From authorizing, approving, or ratifying any contract or other transaction between the Corporation and one or more of its directors or any other corporation, firm,

association or entity in which one or more of the directors are directors or officers or are financially interested under Section 2.11 of the Restated Bylaws. Furthermore, any such authorization, approval, or ratification shall be consistent with MICH. COMP. LAWS § 450.1545a.

(vi) From causing National to issue additional shares of the common stock of National under Section 4.01 of the Restated Bylaws.

(vii) From allowing the CEO of National to contract for the indebtedness of the Corporation separate from the Board of Directors under Section 5.02 of the Restated Bylaws.

(viii) From causing National to issue promissory notes as dividends in lieu of cash under Section 7.01 of the Restated Bylaws.

(ix) From causing National to issue rights, options and/or warrants for National's stock under Section 7.03 of the Restated Bylaws.

(x) From causing National to provide indemnification for any party inconsistent with MICH. COMP. LAWS §§ 450.1561-65 under Section 9.01 of the Restated Bylaws.

This order shall remain in effect until May 31, 2007, or until further order of the Court. **IT IS SO ORDERED.**

Footnotes

1 The Court dismissed Plaintiffs' claims against Rick Purvis because the Court lacked personal jurisdiction over him.

2 The Court dismissed Plaintiffs' claims against Transland because the Court lacked personal jurisdiction over the company.

3 Section 3 of the statute has been amended to include the sentence "Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." MICH. COMP. LAWS § 450.1489(3).

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2012 WL 5857283
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Coletta ESTES and All Others Similarly Situated, Plaintiffs–Appellees,
v.
Adrian ANDERSON and North Point Advisors, L.L.C, Defendants,
and
David Clark, Susan Glaser, Sheila Kneeshaw, Gerald Fischer, Ronald Gracia, Wendall Anthony, Kenneth V. Cockrel, Jr., Kathleen Leavey, Jeffrey Beasley, Monica Conyers, and Dedan Milton, Defendants–Appellants.
Coletta Estes, Terry Smith–Jackson, Terittha Kinney, Eleanor Bennett, Anthony Wheeler, Andreia Johnson, Reginald Bryant, Dynita McCaskill, Anthony Scandoval, Eleanor Bennet, Mark Mapp, and Ronald Morring, Plaintiffs–Appellees,
v.
David Clark, Susan Glaser, Sheila Kneeshaw, Gerald Fischer, Ronald Gracia, Wendall Anthony, Kenneth V. Cockrel, Jr., Kathleen Leavy, Jeffrey Beasley, Monica Conyers, and Dedan Milton, Defendants–Appellants,
and
Adrian Anderson and North Point Advisors, L.L.C, Defendants.
Coletta Estes, Terry Smith–Jackson, Terittha Kinney, Eleanor Bennett, Anthony Wheeler, Andreia Johnson, Reginald Bryant, Dynita McCaskill, Anthony Scandoval, Eleanor Bennet, Mark Mapp, and Ronald Morring, Plaintiffs–Appellees,
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and
Adrian Anderson and North Point Advisors, L.L.C, Defendants,
and
National Conference On Public Employee Retirement Systems, Amicus Curiae.
Coletta Estes, Terry Smith–Jackson, Terittha Kinney, Eleanor Bennett, Anthony Wheeler, Andreia Johnson, Reginald Bryant, Dynita McCaskill, Anthony Scandoval, Eleanor Bennet, Mark Mapp, and Ronald Morring, Plaintiffs–Appellees,
v.
David Clark, Susan Glaser, Sheila Kneeshaw, Gerald Fischer, Ronald Gracia, Wendall Anthony, Kenneth V. Cockrel, Jr., Kathleen Leavy, Jeffrey Beasley, Monica Conyers, and Dedan Milton, Defendants,
and
Adrian Anderson and North Point Advisors, L.L.C, Defendants–Appellants.
David Malhalab and All Others Similarly Situated and Mary Phelps and All Others Similarly Situated, Plaintiffs–Appellees/Cross Appellants,
v.
Marty Bandemer, Jeffrey Beasley, Gregory Best, Gary Christian, Seth Doyle, Frank English, Dedan Milton, James Moore, Tyrone Scott, Paul Stewart, Alberta Tinsley–Talabi, Roger Cheek, Barbara Rose Collins, William Fairweather, Johnny Golden, Laura Isom, Marty Knowles, Sharon McPhail, Jeffrey Pegg, and Clarence Williams, Defendants–Appellants/Cross Appellees,
and
Adrian Anderson and North Point Advisors, L.L.C, Defendants.
Nathan Jack Chase and All Others Similarly Situated, Plaintiffs–Appellees/Cross Appellants,
v.
Rev. Wendall Anthony, David Clark, Monica Conyers, Kenneth V. Cockrel, Jr., Sheila Cockrel, Cedric Cook, Gerald Fischer, Ronald Gracia, Jeffrey Beasley, Susan Glaser, Kwame M. Kilpatrick, Sheila Kneeshaw, Kathleen Leavy, Stephanie Milledge, Dedan Milton, and Timothy Ngare, Defendants–Appellants/Cross Appellees,
and

Adrian Anderson and North Point Advisors, L.L.C, Defendants.
David Malhalab and Mary Phelps, Plaintiffs–Appellees,
v.
Marty Bandemer, Jeffrey Beasley, Gregory Best, Roger Cheek, Gary Christian, Barbara Rose Collins, Seth Doyle, Frank English, William Fairweather, Johnny Golden, Laura Isom, Marty Knowles, Sharon McPhail, Dedan Milton, James Moore, Jeffrey Pegg, Tyrone Scott, Paul Stewart, Alberta Tinsley–Talabi, and Clarence Williams, Defendants–Appellants,
and
Adrian Anderson and North Point Advisors, L.L.C, Defendants.
Nathan Jack Chase and Andrew Daniels El, Plaintiffs–Appellees,
v.
Rev. Wendall Anthony, Jeffrey Beasley, David Clark, Monica Conyers, Kenneth V. Cockrel, Jr., Sheila Cockrel, Cedric Cook, Gerald Fischer, Ronald Gracia, Susan Glaser, Kwame M. Kilpatrick, Sheila Kneeshaw, Kathleen Leavy, Stephanie Milledge, Dedan Milton, and Timothy Ngare, Defendants–Appellants,
and
Adrian Anderson and North Point Advisors, L.L.C, Defendants.

Docket Nos. 294515, 294537, 294555, 294559, 294541, 294543, 294728, 294729. | Nov. 15, 2012.

Wayne Circuit Court; LC No. 09–010080–NZ, LC No. 09–012332–NZ, LC No. 09–010940–NZ.

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

Opinion

PER CURIAM.

*1 These eight consolidated appeals arise from three cases filed in the Wayne Circuit Court that challenge pension fund investments made by the city of Detroit's General Retirement System (LC Nos. 09–010080–NZ and 09–010940–NZ), and the city's Police and Fire Retirement System (LC No. 09–012332–NZ). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Four appeals derive from LC No. 09–010080–NZ. In Docket No. 294515, 11 present and former members of the General Retirement System's Board of Trustees (the trustee defendants) appeal as of right a September 2009 circuit court order denying their motion for summary disposition premised on governmental immunity. In Docket No. 294537, the trustee defendants appeal by leave granted a separate September 2009 order certifying a plaintiff class. In Docket No. 294555, the trustee defendants appeal by leave granted portions of the circuit court's September 2009 order denying summary disposition on grounds unrelated to governmental immunity. And in Docket No. 294559, Adrian Anderson and North Point Advisors, L.L.C. (the investment advisor defendants), two other defendants who advised the General Retirement System on financial matters, appeal by leave granted the circuit court's September 2009 order denying their motion for summary disposition.

Two appeals derive from LC No. 09–010940–NZ. In Docket No. 294543, 16 current and former members of the General Retirement System's Board of Trustees (the trustee defendants) appeal as of right an October 2009 circuit court order denying their motion for summary disposition premised on governmental immunity. Plaintiffs cross-appeal, challenging the circuit court's dismissal of a breach of contract claim and refusal to allow amendment of their complaint. In Docket No. 294729, the trustee defendants appeal by leave granted portions of the circuit court's October 2009 order denying summary disposition unrelated to governmental immunity.

Lastly, two of the appeals derive from LC No. 09–012332–NZ. In Docket No. 294541, 20 current and former members of the Police and Fire Retirement System's Board of Trustees (the trustee defendants) appeal as of right an October 2009 circuit court order denying summary disposition on the basis of governmental immunity. Plaintiffs cross-appeal, challenging the circuit court's dismissal of a breach of contract claim and refusal to allow amendment of their complaint. In Docket No. 294728, the trustee defendants appeal by leave granted portions of the court's October 2009 order denying summary disposition unrelated to governmental immunity.

I

In LC No. 09–010080–NZ, plaintiffs filed an eight-count second amended complaint against 11 current and former trustees of the General Retirement System and their investment advisors. Count I alleged that defendants "repeatedly and flagrantly" violated their fiduciary duties to participants in the General Retirement System as set forth in the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq.*, and that governmental immunity did not shield the trustee defendants from their grossly negligent conduct. Count II alleged a breach of common-law fiduciary duties based on "grossly ill-advised and high risk investments." Count III, alleged a breach of common-law fiduciary duties based on the shredding and loss of Plan-related documents, i.e., "spoliation of evidence." The allegations in Count IV, entitled "gross negligence," included self-dealing, improper and extravagant travel, and approving improper investments. Count V averred a claim of "Waste," in that defendants "improperly dissipated the Plans' assets." Count VI set forth instances of common-law and statutory conversion committed by the trustee defendants, including with regard to extravagant, unnecessary, and improper travel. Count VII contained a request for "declaratory and injunctive relief." And Count VIII alleged that, because of defendants' gross negligence, the Plan suffered losses beyond normal market risk and amounted to "unconstitutional diminishment and/or impairment of accrued financial benefits of the Plan" in violation of Const 1963, art 9, § 24.

*2 In LC Nos. 09–010940–NZ and 09–012332–NZ, substantially similar first amended complaints were filed against 16 current and former trustees of the General Retirement System and 20 current and former trustees of the Police and Fire Retirement System, respectively, as well as the same financial advisors. Count I of the first amended complaints alleged that defendants' investment decisions violated their statutory fiduciary responsibilities under the PERSIA, MCL 38.1132 *et seq.* Count II, captioned "City of Detroit Ordinance," asserted that Detroit ordinances "permit[ ] Plaintiffs to bring this civil action for relief against Defendant–Trustees" for violating their fiduciary duties under the PERSIA. Count III was a negligence claim. Count IV alleged that the trustee defendants had caused the city to breach its agreements with pension plan participants, like plaintiffs. Count V, titled "Breach of Third–Party Contract," alleged that plaintiffs were third-party beneficiaries of the contracts between the investment advisor defendants and the trustee defendants and plaintiffs were harmed by the investment advisor defendants' unreasonable performance. Count VI averred breaches of common-law fiduciary duties; Count VII alleged gross negligence; and Count VIII sought "declaratory and injunctive relief."

II

In Docket Nos. 294555, 294559, 294728, and 294729, appeals arising from each of the three circuit court actions, the trustee defendants and the investment advisor defendants assert that plaintiffs do not have standing to pursue any of the claims in their complaints. Defendants sought summary disposition pursuant to MCR 2 .116(C)(7), (8), and (10), but the circuit court relied on subrule (C)(10) in denying defendants' motions pertaining to standing. Whether a party has legal standing to assert a claim constitutes a question of law that this Court considers de novo. *Heltzel v. Heltzel*, 248 Mich.App 1, 28; 638 NW2d 123 (2001). We also review de novo a circuit court's summary disposition ruling. *Corley v. Detroit Bd of Ed*, 470 Mich. 274, 277; 681 NW2d 342 (2004).

A motion brought pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v. Taylor*, 263 Mich.App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v. Gen Motors Corp*, 469 Mich. 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich.App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich. at 183.

*3 Pursuant to longstanding Michigan jurisprudence on standing, "a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Ed Ass'n v. Lansing Bd of Ed*, 487 Mich. 349, 372; 792 NW2d 686 (2010).

A. STANDING UNDER THE PERSIA, LEGAL CAUSE OF ACTION

1. THE TRUSTEE DEFENDANTS

Defendants initially contend that plaintiffs cannot bring a private cause of action under the PERSIA because it does not include a civil enforcement provision.

The PERSIA is analogous to the federal Employee Retirement Income Security Act, ERISA, 29 USC 1001 *et seq.* ERISA sets minimum standards for pension plans offered by private employers, but does not apply to pension plans established by governmental entities. See 29 USC 1003(b)(1); *Bd of Trustees of City of Birmingham Employees' Retirement Sys v. Comerica Bank,* 767 F Supp 2d 793, 798 (ED Mich, 2011). Neither ERISA nor the PERSIA requires the establishment of pension plans; however, when a pension plan is established, the PERSIA requires that certain minimum standards be met. Like ERISA, the PERSIA requires that fiduciaries of employee pension plans "act with the same care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity and familiar with those matters would use in the conduct of a similar enterprise with similar aims." MCL 38.1133(3)(a); see, also, 29 USC 1104(a)(1)(B). And the PERSIA requires that fiduciaries give appropriate consideration to the facts and circumstances relevant to the particular investment or investment course of action and act accordingly. MCL 38.1133(3)(d).

ERISA, however, includes a civil enforcement provision which provides that participants and beneficiaries may bring civil actions to redress violations of the Act, including violations by fiduciaries. See 29 USC 1109; 29 USC 1132(a)(1) and (1)(1). The PERSIA does not include a civil enforcement provision. But this lack of a specific civil enforcement provision is consistent with the broad constitutional grant of powers of local self-government enjoyed by municipalities as relates to local governmental issues like their retirement plans. See, e.g., *Brouwer v. Bronkema,* 377 Mich. 616, 649–650; 141 NW2d 98 (1966); *Dooley v. City of Detroit,* 370 Mich. 194, 212; 121 NW2d 724 (1963); *Davidson v. Hine,* 151 Mich. 294, 296; 115 NW 246 (1908).

The city of Detroit is a home rule city pursuant to the Home Rule City Act, MCL 117.1 *et seq.* As our Supreme Court observed in *Detroit Police Officers Ass'n v. City of Detroit,* 391 Mich. 44, 66; 214 NW2d 803 (1974), the Home Rule City Act "reflect[s] the position now expressed in Const 1963, art 7, s 22 that Michigan is a strong home rule state with basic local authority." Specifically, Const 1963, art 7, § 22, provides that a city has the power and authority to adopt a charter, as well as resolutions and ordinances "relating to its municipal concerns, property and government, subject to the constitution and law." Accordingly, subject to the constitution and law, home rule cities are governed by their city charter. "Retirement plans are a 'permissible charter provision' adoptable under the broad grant of authority bound in [MCL 117.4i and 117.4j] of the Home Rule Cities Act." *Detroit Police Officers Ass'n,* 391 Mich. at 66. As our Supreme Court has held "the entire subject of pensions, including the manner of proving the right thereto, is subject to control by the people of the municipality in the adoption of their charter." *Kelly v. City of Detroit,* 358 Mich. 290, 299; 100 NW2d 269 (1960). That is, "[p]ension matters ... in a municipality operating under a home-rule or freeholders' charter are generally held to be within the exclusive control of the municipality." *Id.* at 298 (citation omitted).

*4 The Detroit City Charter provides for retirement plans in Article 11. In particular, Section 11–101 provides:

> 1. The City shall provide, by ordinance, for the establishment and maintenance of retirement plan coverage for city employees.
>
> 2. Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and that funding shall not be used for financing unfunded accrued liabilities.
>
> 3. The accrued financial benefits of active and retired city employees, being contractual obligations of the city, shall in no event be diminished or impaired.

Section 11–103 provides that two governing bodies exist to administer the city's General Retirement System and the Police and Fire Retirement System.

The Detroit Municipal Code, in Chapter 47, sets forth provisions related to the retirement system. Article 1 sets forth the common provisions of the retirement system and several provisions cite to the PERSIA as authority. See, e.g., Sections 47–1–12 and 47–1–15. Article 4 of Chapter 47 sets forth miscellaneous provisions of the retirement system, and includes the following provision which appears to have been effective since 2001:

> **Sec. 47–4–3.—Enforcement; civil action.**

> A civil action for relief against any act or practice which violates the state law, the 1997 Detroit City Charter, 1984 Detroit City Code or the terms of this Plan, may be brought by:
>
> (1) A Plan participant who is or may become eligible to receive a benefit;
>
> (2) A beneficiary who is or may become eligible to receive a benefit;
>
> (3) A Plan fiduciary, including a Trustee;
>
> (4) The Finance Director, on behalf of the City as Plan sponsor. [1]

In this case, plaintiffs, as plan participants or beneficiaries, alleged that defendant trustees violated a state law, in particular their fiduciary duties arising under the PERSIA, including MCL 38.1133(3)(a) and (3)(d). "[A]pplicable general laws of the state must be read into the charters of municipal corporations." *Council of City of Saginaw v. Bd of Trustees of Policemen & Firemen Retirement System of City of Saginaw*, 321 Mich. 641, 647; 32 NW2d 899 (1948). But it is a tort claim because plaintiffs alleged breach of duties imposed by law, the PERSIA. Although a municipality like Detroit has broad authority, that authority is subject to statutory limitations, Const 1963, art 7, § 22, including the governmental tort liability act (GTLA) which provides that a governmental agency is immune from tort liability if "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1).

A "governmental function" is activity expressly or impliedly mandated or authorized by charter or ordinance. MCL 691.1401(f); *Maskery v. Univ of Mich. Bd of Regents*, 468 Mich. 609, 613–614; 664 NW2d 165 (2003). The focus is on the general activity, not the specific conduct involved at the time of the alleged tort. *Tate v.. Grand Rapids*, 256 Mich.App 656, 661; 671 NW2d 84 (2003). In this case, Article 11 of the city charter provides for the establishment of two boards of trustees as governing bodies for administering the city's retirement plans. Plaintiffs' claims arise from the trustee defendants' alleged acts related to administering the city's retirement plans, i.e., a governmental function. The Legislature has not specifically authorized a private cause of action under the PERSIA in avoidance of governmental immunity. See *Lash v. Traverse City*, 479 Mich. 180, 194; 735 NW2d 628 (2007). Although the Detroit Municipal Code may appear to have authorized such a cause of action, the city could not create a cause of action against itself in contravention of the broad scope of governmental immunity. See *Mack v. Detroit*, 467 Mich. 186, 196; 649 NW2d 47 (2002). Thus, contrary to the circuit court's conclusion that Detroit ordinances invested plaintiffs with standing to challenge investment decisions of the trustee defendants, none of the plaintiffs in these cases may pursue a legal cause of action for the alleged PERSIA violations against the trustee defendants. See *Lansing Sch Ed Ass'n*, 487 Mich. at 372.

2. THE INVESTMENT ADVISOR DEFENDANTS

*5 Defendant Anderson works as the president of defendant North Point Advisors, a private entity, which rendered services to the retirement system. Because the investment advisor defendants were not engaged in a "governmental function" when they rendered such services, they are not entitled to the protection of governmental immunity. See *Rambus v. Wayne Co Gen Hosp*, 193 Mich.App 268, 273; 483 NW2d 455 (1992). As set forth above, the Detroit Municipal Code authorized plan participants, beneficiaries, fiduciaries, and the Plan sponsor to bring "[a] civil action for relief against any act or practice which violates the state law." "The framers of the charter, and the people of the city in its adoption, must be presumed to have intended that the provision be construed as it reads." *Kelly*, 358 Mich. at 296.

Plaintiffs, as plan participants or beneficiaries, alleged that the investment advisor defendants violated state law, in particular, the PERSIA. Pursuant to the PERSIA, the investment advisor defendants constitute "investment fiduciaries," which MCL 38.1132c(l)(b) defines as including a person who "[r]enders investment advice for a system for a fee or other direct or indirect compensation." Plaintiffs alleged that the investment advisor defendants violated their investment fiduciary duties as set forth in MCL 38.1133(3). Accordingly, as the trial court concluded, plaintiffs have standing to pursue their cause of actions against the investment advisor defendants for violations of the PERSIA.

B. DECLARATORY RELIEF UNDER THE PERSIA

Governmental immunity prohibits plaintiffs from pursuing tort claims against the trustee defendants, but such immunity does not prevent the enforcement of the PERSIA by declaratory judgment if the requirements of MCR 2.605 are

met. See *Lansing Sch Ed Ass'n,* 487 Mich. at 372; *Lash,* 479 Mich. at 194–196. According to MCR 2.605(A)(1), "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." "An 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Groves v. Dep't of Corrections,* 295 Mich.App 1, 10; 811 NW2d 563 (2011) (internal quotation and citation omitted). And the purpose of a declaratory judgment is "to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *Rose v. State Farm Mut Auto Ins Co,* 274 Mich.App 291, 294; 732 NW2d 160 (2006).

In this case, an "actual controversy" does not exist because a declaratory judgment is not necessary to guide plaintiffs' "future conduct in order to preserve [their] legal rights." *Groves,* 295 Mich.App at 10. And, because plaintiffs have alleged actual injury and violations of the law, the objectives of the declaratory judgment rule cannot be met. Accordingly, plaintiffs do not have standing to pursue a declaratory judgment action against either the trustee defendants or the investment advisor defendants with regard to their PERSIA-based claims.

C. PLAINTIFFS' STANDING TO BRING OTHER CLAIMS (LC NO. 09–010080–NZ)

*6 In their complaint, plaintiffs also alleged that the trustee defendants breached their common-law fiduciary duties. It is clear that a fiduciary relationship existed between plaintiffs as plan participants or beneficiaries and the trustee defendants. See *In re Karmey Estate,* 468 Mich. 68, 75 n2; 658 NW2d 796 (2003), quoting Black's Law Dictionary (7th ed). Accordingly, the trustee defendants had a duty to act for the benefit of plaintiffs on matters within the scope of that relationship. *Id.* "Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio v. Ramirez,* 211 Mich.App 501, 508; 536 NW2d 280 (1995).

Here, plaintiffs alleged and offered evidence [2] that the trustee defendants breached their fiduciary duties in several respects, including by making imprudent and improper investments causing losses of retirement funds, destroying evidence, and engaging in self-dealing such as spending funds on unnecessary and extravagant travel. [3] However, this state treats a breach of fiduciary duty claim as a common-law tort. *Miller v. Magline, Inc.* 76 Mich.App 284, 313; 256 NW2d 761 (1977). As discussed above, the trustee defendants are entitled to immunity for tort claims. See MCL 691.1407(1). But in Count IV of their complaint, plaintiffs alleged that the trustee defendants were not entitled to immunity because their conduct was grossly negligent. MCL 691.1407(2)(c) sets forth as a condition of immunity that "conduct [ ] not amount to gross negligence that is the proximate cause of the injury or damage." Because plaintiffs pleaded in avoidance of governmental immunity, the circuit court properly denied the trustee defendants' motion for summary disposition on the basis of standing with regard to plaintiffs' claims that the trustee defendants violated their common-law fiduciary duties.

We also conclude that plaintiffs have standing to assert their claims of common-law and statutory conversion set forth in Count VI, legal causes of action grounded in the trustee defendants allegedly spending plan funds "on extravagant, unnecessary and improper trips ." And plaintiffs possess standing to assert their claims set forth in Count VIII, that both the trustee defendants and investment advisor defendants violated Const 1963, art 9, § 24, which declares: "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."

D. PLAINTIFFS' STANDING IN LC NOS. 09–010940–NZ AND 09–012332–NZ

Unlike the plaintiffs in LC No. 09–010080–NZ, plaintiffs in LC Nos. 09–010940–NZ and 09–012332–NZ did not submit with their responses to the trustee defendants' motions for summary disposition an affidavit explaining how defendants' course of conduct (poor investments, self-dealing) harmed or placed at risk plaintiffs' interests in the retirement system. Nor did plaintiffs attach any affidavit, court records, or documentary evidence in admissible form; they attached copies of *Detroit Free Press* articles that reported on excessive travel by some board members and failed investments. The newspaper articles themselves do not constitute admissible evidence, *Baker v. Gen Motors Corp*

(After Remand), 420 Mich. 463, 512; 363 NW2d 602 (1984), but the contents of some of the articles might be admissible. MCR 2.116(G)(5). Even assuming that plaintiffs in LC Nos. 09–010940–NZ and 09–012332–NZ inadequately supported their summary disposition responses, the trustee defendants' motions for summary disposition were inappropriate given the early stage of these litigations.

E. DISCOVERY INCOMPLETE IN ALL THREE CIRCUIT COURT ACTIONS

*7 With respect to all three circuit court actions, a basic, well-established procedural proposition supported the circuit court's denial of defendants' motions for summary disposition contesting plaintiffs' standing: "[I]ncomplete discovery generally precludes summary disposition, [unless] ... further discovery does not stand a fair chance of finding factual support for the nonmoving party." *VanVorous v. Burmeister*, 262 Mich.App 467, 476–477; 687 NW2d 132 (2004). The circuit court record in LC No. 09–010080–NZ contains four voluminous files, but when defendants filed their motions for summary disposition discovery remained ongoing. Plaintiffs filed their initial complaint on April 29, 2009, and the trustee defendants filed their motion for summary disposition on July 17, 2009, just 79 days later. The Court in *VanVorous*, 262 Mich.App at 477, noted that a "party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists ." (Internal quotation and citation omitted). In plaintiffs' summary disposition response, they appended many exhibits tending to substantiate the allegations in their second amended complaint, including an affidavit and other documents tending to suggest that defendants had invested unwisely and squandered plan funds. In summary, plaintiffs in LC No. 09–010080–NZ have presented "some independent evidence that a factual dispute exists" in this case, and that further discovery "stand [s] a fair chance of finding factual support for the nonmoving party." *VanVorous*, 262 Mich.App at 477. The circuit court thus correctly denied defendants' motions for summary disposition on the basis that plaintiffs lacked standing.

In LC Nos. 09–010940–NZ and 09–012332–NZ, summary disposition likewise was inappropriate because no discovery had occurred. See *VanVorous*, 262 Mich.App at 476–477. The newspaper articles attached to plaintiffs' summary disposition responses in these cases comprise at least some independent evidence in support of their bad investment and self-dealing allegations. *Id.* at 477. There is a reasonable likelihood that plaintiffs could secure some admissible evidence supporting their breach of fiduciary duty and gross negligence claims, which they had standing to bring. *Lansing Sch Ed Ass'n*, 487 Mich. at 372.[4] The circuit court correctly denied defendants' motions for summary disposition on the basis that plaintiffs lacked standing, even assuming that the court may have erred in premising its ruling on the Detroit retirement system ordinances and dismissing the declaratory relief count of the complaint. See *Klooster*, 488 Mich. at 313.

F. CONCLUSIONS CONCERNING STANDING

In LC No. 09–010080–NZ, the trustee defendants' motion for summary disposition on the basis of standing with regard to Count I, the alleged PERSIA violations, should have been granted, and summary disposition of Count VII, the request for declaratory relief, was properly granted. The investment advisor defendants' motion for summary disposition on the basis of standing with regard to Count I, the alleged PERSIA violations, was properly denied. The circuit court properly denied the trustee defendants' and the investment advisor defendants' motions for summary disposition on the basis of standing with regard to (1) Count II, breach of common-law fiduciary duties, (2) Count IV, gross negligence, (3) Count VI, conversion, and (4) Count VIII, the violation of Const 1963, art 9, § 24. The court properly dismissed Count III, spoliation, and Count V, waste, as separate counts.

*8 In LC Nos. 09–010940–NZ and 09–012332–NZ, the trustee defendants' motion for summary disposition on the basis of standing with regard to Count I, the alleged PERSIA violations, should have been granted, and summary disposition of Count VIII, the request for declaratory relief, was properly granted. The investment advisor defendants' motion for summary disposition on the basis of standing with regard to Count I, the alleged PERSIA violations, and Count II, the ordinances under which plaintiffs sought relief, was properly denied. The circuit court properly denied defendants' motions for summary disposition of (1) Count III, negligence, (2) Count VI, breach of common-law fiduciary duties, and (3) Count VII, gross negligence. Plaintiffs' inadequately pleaded breach of contract claims, as set forth in Counts IV and V, were properly dismissed.

III

In Docket Nos. 294515, 294541, and 294543, the trustee defendants in each circuit court action assert that the circuit court erred in denying their motions for summary disposition premised on governmental immunity. The circuit court stated that it denied the motions for summary disposition premised on governmental immunity under MCL 2.116(C)(7).

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. [The reviewing court] consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. [*Fane v. Detroit Library Comm'n*, 465 Mich. 68, 74; 631 NW2d 678 (2001).]

A. LC NO. 09–010080–NZ

Pursuant to MCL 691.1407(7)(a), "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial disregard for whether an injury results." MCL 691.1407(7)(a). Accepting as true plaintiffs' allegations in LC No. 09–010080–NZ, including that the defendant trustees entered into multiple "grossly ill-advised and high-risk" pension fund investments with little investigation and contrary to the advice of most investment consultants, as well as spent pension funds on numerous unnecessary and extravagant trips, a reasonable inference arises that the trustee defendants engaged in "conduct so reckless as to demonstrate a substantial disregard for whether" injury resulted to the retirement system. See MCL 691.1407(7)(a). The complaint also maintained that "Defendants' breaches of duty and gross negligence are the proximate cause of the injury." The trustee defendants did not submit with their motion any documentary evidence contradicting the complaint's assertions. Thus, the motion for summary disposition was properly denied.

B. LC NOS. 09–010940–NZ AND 09–012332–NZ

In LC Nos. 09–010940–NZ and 09–012332–NZ, the first amended complaints mentioned the defendant trustees' series of ill-advised and high risk pension fund investments, as well as their excessive travel that included attending numerous meetings in California, Chicago, Arizona, Florida, New York, and Singapore in a six-month period of time. The first amended complaints also contain a gross negligence count, Count VII. The first amended complaints do not as extensively describe the allegedly reckless conduct as the second amended complaint does in LC No. 09-010080–NZ. However, accepting as true the allegations in the first amended complaints as a whole, they at least arguably suggest that defendants engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," MCL 691.1407(7)(a), and that defendants proximately caused the injuries alleged.

C. DISCOVERY INCOMPLETE

*9 Moreover, summary disposition on the issue of governmental immunity also is improper because discovery remains incomplete in LC No. 09–010080–NZ, and there has been little to no discovery in LC Nos. 09–010940–NZ and 09–012332–NZ. The circuit court reached the correct result in denying defendants' motions for summary disposition based on governmental immunity. However, we caution that bad investment decisions as determined in hindsight do not constitute gross negligence.

IV

Lastly, in Docket No. 294537, the trustee defendants argue that the circuit court erred in several respects when it granted plaintiffs' motion for class certification. For the reasons discussed above, we reject the trustee defendants' first contention that the class certification was a mistake because plaintiffs lacked standing.

The trustee defendants next submit that "the record does not reveal ... whether the trial court engaged in *any* analysis of whether the prerequisites were met, let alone a sufficient analysis to satisfy the standard set by" the Michigan Supreme Court. [Emphasis in original.]

"Pursuant to MCR 3.501(A)(1), members of a class may only sue or be sued as a representative party of all class members if the prerequisites dictated by the court rule are met." *Henry v.*

Dow Chem Co, 484 Mich. 483, 496; 772 NW2d 301 (2009). Our Supreme Court elaborated as follows, in *Henry*, 484 Mich. at 502–504, concerning the quantum of information that a party seeking class certification must supply a circuit court:

> [A] certifying court may not simply "rubber stamp" a party's allegations that the class certification prerequisites are met. However, the federal "rigorous analysis" requirement does not necessarily bind state courts.... Given that MCR 3.501(A) expressly conditions a class action on satisfaction of the prerequisites, a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A) is in fact satisfied. A court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met. The averments in the pleadings of a party seeking class certification are only sufficient to certify a class if they satisfy the burden on the party seeking certification to prove that the prerequisites are met, such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party.
>
> If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper. However, when considering the information provided to support class certification, courts must not abandon the well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage in the proceedings.... [S]tate courts also have broad discretion to determine whether a class will be certified.... [Emphasis in original.]

*10 In LC No. 09–010080–NZ, plaintiffs' second amended complaint recited 14 paragraphs under the heading, "Class Action Allegations," which addressed the class action prerequisites in MCR 3.501(A)(1). Later, plaintiffs filed a motion and brief seeking class certification in which they summarized the facts underlying the claims of the entire proposed class, and added specific details to their complaint's class action allegations, including that:

- approximately 9,000 active members of the Plan were damaged by defendants' conduct,
- the claims of the proposed class members had "questions of law and fact in common," including whether defendants "violated their statutory fiduciary duties established by PERSIA," "violated common law fiduciary duties owed to the Plan and Plan participants," and "were negligent [or grossly negligent] with respect to the Plan,"
- "the only individual issue will be that of each individual Class member's damages,"
- plaintiffs' counsel had "particular and extensive experience in litigating complex class actions" and "[c]ertifying the Class ... is the superior, if not only, mechanism by which to proceed" because "[a]djudication of the legality of Defendants' actions will determine most ... liability issues for all Class members,"
- the class members' best interests weighed in favor of certifying the proposed class,
- the proposed class' claim for declaratory and injunctive relief "weigh[ed] heavily in favor of class certification,"
- the case did not present any disparate issues that might render the class action unmanageable,
- certification "will bring finality to the litigation on this issue and it will avoid additional litigation by other members of the plaintiff Class," and
- in light of the relatively small damages suffered by individual class members, the present case was well-suited "to the class action procedural device, because Class members may be precluded from pursuing their rights individually, due to the economics of doing so."

On September 23, 2009, the circuit court entered an order granting the motion for class certification. The order provides:

> Plaintiff[s] having filed a Motion for Class Certification; Defendants having opposed Plaintiffs' Motion for Class Certification; *the Court having reviewed all of the Briefs and supporting material submitted* [emphasis added], and having heard oral argument of counsel for the Parties; and being fully advised in the premises:
>
> * * *
>
> IT IS ... ORDERED that Plaintiffs' Motion for Class Certification is GRANTED as this Court is satisfied that:
>
> (a) The class is so numerous that joinder of all members is impracticable as there are approximately 9,000 members;

(b) There are questions of law, breach of fiduciary duty, and gross negligence; or questions of fact, Plaintiffs lost money; common to the members of the class that predominate over questions affecting only individual members;

*11 (c) The claims or defenses of the representative parties, as derivative Plaintiffs that lost a percentage of the Plan money, are typical of the claims or defenses of the class;

(d) The representative parties have fairly and adequately asserted the interests of the class; and

(e) The maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Further, this Court is satisfied:

(a) That this class action is the superior method of adjudicating because the prosecution of separate actions by or against individual members of the class could create a risk of:

i. Inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; and

ii. Adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) Equitable or declaratory relief might be appropriate with respect to the class;

(c) The action will be manageable as a class action;

(d) The separate claims of individual class members are insufficient to support separate actions;

(e) It is probable that the amount which may be recovered by the derivative class members justifies a class action; and

(f) Members of the class have a significant interest in controlling the prosecution and defense of all actions.

The class shall be certified as follows: all active Detroit employee and retiree participants in the Detroit General Retirement System, and all beneficiaries of a participant in the Detroit General Retirement System;

* * *

IT IS FURTHER ORDERED that the Class shall receive notice pursuant to MCR 3.501(C)(5), and that the Class Notice will be published in the following newspapers, for the following time periods: The Detroit Free Press *and* The Detroit News, one 5.5 inch–by–5 inch display to run Monday through Friday for two consecutive weeks and on two consecutive Sundays. Also, Plaintiffs' counsel shall receive any responses to the various forms of notice, and shall promptly inform the Court of any class members who choose to opt out of this litigation. [Emphasis in original.]

Our review of the record confirms that plaintiffs satisfied their obligation "to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A) is in fact satisfied." *Henry*, 484 Mich. at 502. The circuit court considered the many class action allegations in plaintiffs' complaint, the documentation that plaintiffs submitted to substantiate their motion for class certification, and the parties' many briefs pertaining to certification. In light of the complaint's class action allegations and the evidence plaintiffs appended to their motion for class certification, which the circuit court referenced in deciding the motion, we conclude that (1) the circuit court's order adequately explains that the prerequisites for class certification existed in this case; (2) the circuit court's order contains no clearly erroneous findings of fact; and (3) the circuit court acted within its discretion in entering the order certifying the plaintiff class. See *Henry*, 484 Mich. at 495–496.

*12 Contrary to the trustee defendants' inadequate notice arguments, the order granting certification satisfied court rule notice requirements. "As soon as practicable, the court shall determine how, when, by whom, and to whom the notice shall be given; the content of the notice; and to whom the response to the notice is to be sent." MCR 3.501(C)(3). The order granting certification makes evident that notice shall occur (1) by publication (how), a notice method specifically contemplated in MCR 3.501(C)(4)(b), in the *Detroit Free Press* and the *Detroit News;* (2) "Monday through Friday for two consecutive weeks and on two consecutive Sundays" (when); (3) to "all active Detroit employee and retiree participants in the Detroit General Retirement System, and all beneficiaries of a participant in the Detroit General Retirement System" (to whom); (4)

"the Class shall receive notice pursuant to MCR 3.501(C)(5)," which sets forth in subrules (a)-(h) mandatory notice contents (the content of the notice); (5) "Plaintiffs' counsel shall receive any responses to the various forms of notice, and shall promptly inform the Court of any class members who choose to opt out of this litigation" (to whom responses should be sent); and (6) the trustee defendants do not contradict plaintiffs' appellate contention that they prepared the notice.[5] Although the trustee defendants complain that the "court did not review nor make any findings with respect to the sufficiency of the form, substance or manner of class notice," the trustee defendants do not mention any specific information that the court purportedly failed to consider in formulating the notice, and they do not explain any manner in which the failure to take into account the information could have prejudiced anyone—the potential class members, plaintiffs, or defendants. MCR 2.613(A). Accordingly, the circuit court's order granting plaintiffs' motion for class certification is affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Footnotes

1 In accordance with this provision, for example, the Police and Fire Retirement System and the General Retirement System of the City of Detroit have brought a civil action as "pension plan[s] and trust[s] established by the Charter and Municipal Code of the City of Detroit." *Police & Fire Retirement Sys of City of Detroit v. Watkins*, unreported opinion, No. 08–12582 (ED Mich, Sept 30, 2009).

2 The newspaper articles that plaintiffs attached to their summary disposition response qualify as hearsay. *Baker v. Gen Motors Corp (After Remand)*, 420 Mich. 463, 512; 363 NW2d 602 (1984). But the articles may contain at least some admissible content. MCR 2.116(G)(5) ("documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that *the content or substance would be admissible as evidence* ") (emphasis added).

3 We note that Count III (spoliation of evidence and document destruction) and Count V (spending funds on unnecessary travel) were properly dismissed as distinct causes of action by the circuit court.

4 In Docket Nos. 294541 and 294543, plaintiffs in LC Nos. 09–010940–NZ and 09–012332–NZ cross-appeal contesting the circuit court's summary dismissal of their breach of contract counts (Counts IV and V) pursuant to MCR 2.116(C)(8). We affirm the dismissal because these counts do not reference any specific agreements and consist entirely of conclusory allegations. On remand, plaintiffs may seek leave to file more specific breach of contract counts in amended complaints. See MCR 2.118(A)(2).

5 In MCR 3.501(C)(6)(a), the Supreme Court placed on the plaintiff the burden of paying for the notice to the class.

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2006 WL 3500897
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Stephen D. **FORSBERG**, Plaintiff-Appellant,

v.

FORSBERG FLOWERS, INC, Lou Ann Balding, and Mark H. **Forsberg**, Defendants-Appellees.

Docket No. 253762. | Dec. 5, 2006.

Marquette Circuit Court; LC No. 02-039529-NZ.

Before: WHITBECK, C.J., and MURPHY and SMOLENSKI, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right an order granting summary disposition in favor of defendants on his wrongful termination claim, an order denying his request for a jury trial, and an order granting defendants involuntary dismissal on his remaining claims arising under MCL 450.1489. We affirm.

Defendant **Forsberg Flowers**, Inc. (defendant corporation) is a Michigan close corporation. Plaintiff is a minority shareholder of the business. Defendants Mark **Forsberg** (defendant **Forsberg**) and Lou Ann Balding (defendant Balding) (collectively "defendants") are also shareholders. The three are siblings. Though plaintiff's business relationship with defendants has generally been marked by disagreement and discord, this dispute arises most directly out of a shareholders' meeting in which plaintiff was removed from his employment with defendant corporation by defendants.

I

Plaintiff first argues the circuit court erred in dismissing his claim for wrongful termination. We disagree. We review summary disposition rulings de novo. *McClements v. Ford Motor Co*, 473 Mich. 373, 380; 702 NW2d 166 (2005). Review of a motion for summary disposition under MCR 2.116(C)(8) assumes the "factual allegations in the nonmoving party's pleadings are true and ... [assesses whether] there is a legally sufficient basis for the claim." *Salinas v. Genesys Health Sys*, 263 Mich.App 315, 317; 688 NW2d 112 (2004). Our review is limited to the pleadings. *Maiden v. Rozwood*, 461 Mich. 109, 119-120; 597 NW2d 817 (1999).

"Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party." *Lytle v. Malady (On Rehearing)*, 458 Mich. 153, 163; 579 NW2d 906 (1998) (opinion of Weaver, J.). This presumption may be overcome, *Rood v. Gen Dynamics Corp*, 444 Mich. 107, 117; 507 NW2d 591 (1993), and a plaintiff alleging wrongful discharge may prove the same through one of the following:

> (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause"; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. [*Lytle, supra* at 164 (citations omitted).]

A two-step inquiry is utilized to evaluate a "legitimate expectation" claim: "The first step is to decide 'what, if anything, the employer has promised,' and the second requires a determination of whether that promise is 'reasonably capable of instilling a legitimate expectation of just-cause employment....' " *Id.* at 164-165 (citation omitted and alteration in original).

Upon review of his complaint, we conclude that plaintiff has failed to state a claim for wrongful termination cognizable at law. *Salinas, supra* at 317. Plaintiff does not allege either "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause" or "an express agreement, either written or oral, regarding job security that is clear and unequivocal." *Lytle, supra* at 164. The only reference to any such agreement is plaintiff's claim that he was terminated "in breach of .... [his] employment contract." This allegation, however, does not purport to establish a "just cause" or "definite term" provision, nor does it allege a "clear and unequivocal" agreement. *Id.* Indeed, this statement is nothing more than a conclusory allegation that an employment contract existed, with no reference to its specific terms. And it is well-established that "[c]onclusory statements, unsupported by factual allegations,

are insufficient to state a cause of action." *Churella v. Pioneer State Mut. Ins. Co.*, 258 Mich.App 260, 272; 671 NW2d 125 (2003), citing *ETT Ambulance Service Corp. v. Rockford Ambulance, Inc.*, 204 Mich.App 392, 395; 516 NW2d 498 (1994); see also *NuVision, Inc. v. Dunscombe*, 163 Mich.App 674, 681; 415 NW2d 234 (1987).

*2 Plaintiff's wrongful termination claim may be best characterized as a "legitimate expectation" claim because, plaintiff argues on appeal, his status as a shareholder, officer and director of the business afforded him such an expectation. But plaintiff does not allege " 'what, if anything, ... [defendant corporation] has promised,' " nor whether and how any such promises reasonably instilled in him " 'a legitimate expectation of just-cause employment.' " *Lytle, supra* at 164-165. Moreover, plaintiff's status as a shareholder and officer could not, in and of itself, legitimately create such an expectation. See *Franchino v. Franchino*, 263 Mich.App 172, 184; 687 NW2d 620 (2004) (noting that "employment and board membership are not considered shareholder rights"); MCL 450.1535(1) ("An officer elected or appointed by the board may be removed by the board with or without cause. An officer elected by the shareholders may be removed with or without cause, only by a vote of the shareholders...."). Plaintiff thus did not enjoy a legitimate expectation of employment for a definite term or absent just cause.

II

Plaintiff next argues that the circuit court erred in denying his request for a jury trial. We disagree. We review questions of statutory interpretation de novo. *Ayar v. Foodland Distributors*, 472 Mich. 713, 715; 698 NW2d 875 (2005). And whether a party is entitled to a jury trial is a constitutional question we review de novo. *Anzaldua v. Band*, 457 Mich. 530, 533; 578 NW2d 306 (1998).

A statutory cause of action may or may not grant the right to a jury trial, depending on legislative design. See *id.* at 533-550. We must therefore evaluate whether MCL 450.1489 afforded plaintiff a jury trial right.

MCL 450.1489(1) provides as follows:

> A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
>
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
>
> (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.
>
> *3 (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Casco Twp v. Secretary of State*, 472 Mich. 566, 571; 701 NW2d 102 (2005). This intent is best discerned from the statutory language. *Neal v. Wilkes*, 470 Mich. 661, 665; 685 NW2d 648 (2004). "Clear and unambiguous statutory language is given its plain meaning, and is enforced as written." *Ayar, supra* at 716.

In *Anzaldua, supra*, our Supreme Court addressed whether a right to a jury trial was guaranteed under sections 3 and 4 of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq. Anzaldua, supra* at 534. Section 3 provides that

> (1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his or her principal place of business.

(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney fees. [MCL 15.363.]

Section 4 provides that,

> A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate. [MCL 15.364.]

The Court observed that the WPA did not expressly indicate whether actions under its provisions were to be tried by a judge or jury. *Anzaldua, supra* at 535. In evaluating the relevant provisions, the Court reasoned as follows:

> Defendants argue that the Legislature's use of "court" rather than "court or jury" is determinative. We disagree. What is important in understanding the Legislature's intent is not that it used the word "court" instead of "jury," but, rather, what it provided that the "court" should do. The Legislature described the court's role in WPA actions in terms of "rendering a judgment," *not* in terms of "awarding damages." The expressions are not interchangeable; "awarding damages" and "rendering a judgment" have different meanings.
>
> *4 When a court renders a judgment, it is entering an order based on previously decided issues of fact. "Rendering judgment" does not mean the judge is making a determination of the entitlement of a party to an award of actual damages. Instead, it is the procedural step the judge takes after the factfinder has made that determination. The difference in the terms is made clear by the statute itself. The WPA provides that the court is to "award attorney fees." Deciding the entitlement to an award of attorney fees has traditionally been the job of a judge, not a jury. Because the act provides that the court should award attorney fees, it is clear that the Legislature intended that a judge should decide whether a party is entitled to fees, and in what amount. [*Id.* at 536-537 (emphasis in original).]

By its unambiguous language, we conclude MCL 450.1489 does not provide for a right to a jury trial. It does not direct before whom an action is to be tried. However, it expressly indicates that, when a party establishes grounds for relief, "the circuit court may make an order or grant relief as it considers appropriate." MCL 450.1489(1). This is a directive as to what the court "should do." *Anzaldua, supra* at 536. It does not presume, in contrast to the WPA, that in doing so the court "is entering an order based on previously decided issues of fact." *Id.* Moreover, five of the six enumerated remedies in MCL 450.1489 are equitable in nature. See MCL 450.1489(1)(a)-(e); cf. *Anzaldua, supra* at 541 (discussing legal remedy of money damages). While the court is likewise authorized to award damages, MCL 450.1489(1)(f), "the mere fact that damages are sought is not determinative of the legal or equitable nature of the action, because damages may be recovered in purely equitable proceedings." *Anzaldua v. Band*, 216 Mich.App 561, 576 n 4; 550 NW2d 544 (1996), aff'd 457 Mich. 530 (1998) [hereinafter "*Anzaldua II* "]. Because MCL 450.1489 contemplates that the circuit court fashion an order or grant relief it deems appropriate, a jury trial right is not embodied in the statute.

Although the inclusion of a potential award of damages under MCL 450.1489 could be deemed legal in nature, and thus within the province of a jury, see *Anzaldua, supra* at 541, such a conclusion is not consistent with the history of this statute. As originally enacted, MCL 450.1489 contained the remedies enumerated in its current form, including language expressly authorizing an award of damages. See 1989 PA 121, § 489. The predecessor to MCL 450.1489 was MCL 450.1825. See 1972 PA 284, § 825; see also *Estes v. Idea Engineering & Fabricating, Inc*, 250 Mich.App 270, 284; 649 NW2d 84 (2002). MCL 450.1825 granted circuit courts the power to take the same actions currently stated under MCL 450.1489, except that the courts were not specifically authorized to award damages. Both statutes empowered circuit courts to "make orders" or "grant relief" as appropriate. However, the actions embodied in MCL 450.1825 were traditionally considered to be equitable in nature. See, e.g., *Barnett*

v. International Tennis Corp, 80 Mich.App 396, 403-404, 416-417; 263 NW2d 908 (1978). The addition of authority to award damages did not change the character of these actions, given that the other provisions remained substantially the same. Further, nothing surrounding the enactment of MCL 450.1489 suggests that the Legislature intended this authorization to alter the equitable nature of the action.

*5 Having concluded that MCL 450.1489 does not provide for a jury trial right, we must still evaluate whether a jury trial is nonetheless constitutionally required. The Michigan Constitution guarantees that "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Const 1963, art 1, § 14. This right exists as it has previously become known to the jurisprudence of Michigan. *Phillips v. Mirac, Inc,* 470 Mich. 415, 425; 685 NW2d 174 (2004). That is, to the extent MCL 450.1489 embodies a legal cause of action cognizable at common law, the right of a jury trial is preserved for an action under its terms. And this remains despite the absence of an express grant of a jury trial right under its provisions.

In *Anzaldua II, supra,* this Court addressed this constitutional requirement in the context of the WPA. We held that "the appropriate test for determining whether a right to a jury trial 'remains' is to examine the nature of the action." *Anzaldua II, supra* at 584. This inquiry involves evaluating "whether the cause of action would have been denominated as legal at the time that the 1963 constitution was adopted and, therefore, whether a party bringing the action would have been accorded a right to a jury trial." *Id.* at 565.

Michigan has long recognized "that a court of equity has inherent power to decree the dissolution of a corporation when a case for equitable relief is made out upon traditional equitable principles." *Levant v. Kowal,* 350 Mich. 232, 241; 86 NW2d 336 (1957). Similarly, a court of equity,

> has ample power in other ways [than dissolution] to give relief for substantially all corporate ills. It may require an accounting for misappropriation of funds, secret profits, and the like. It may restrain or compel the corporation and its officers to lawful conduct, and, ordinarily, protect the stockholders in all their rights without dissolution. [*Stott Realty Co v. Orloff,* 262 Mich. 375, 381; 247 NW 698 (1933) (citation omitted).]

See also *Burch v. Norton Hotel Co.,* 261 Mich. 311, 314-315; 246 NW 131 (1933). In such circumstances, courts of equity operated as fact-finders, independent of a jury. See *Holden v. Lashley-Cox Land Co.,* 316 Mich. 478; 25 NW2d 590 (1947); *Turner v. Calumet & Hecla Mining Co.,* 187 Mich. 238, 251; 153 NW 718 (1915); *Miner v. Belle Isle Ice Co.,* 93 Mich. 97; 53 NW 218 (1892).

Although MCL 450.1489 did not exist as a cause of action prior to 1963, its "nature" is similar to a traditional equitable action. It authorizes an action for fraudulent or oppressive conduct visited upon minority shareholders, cf. *Turner, supra* at 240-247; *Miner, supra* at 98-108, and authorizes various equitable remedies in the event of such conduct, Cf. *Turner, supra* at 250; *Miner, supra* at 117-118; see also *Stott Realty Co., supra* at 381. Indeed, we recently recognized that MCL 450.1489 was

> *6 "added to the Michigan statutes to give a statutory cause of action to shareholders who are abused by controlling persons. The claim under section 489 is direct, not derivative. The statutory cause of action is, of course, similar to the common law shareholder equitable action for dissolution, but is independent of that traditionally limited and uncertain cause of action." [*Estes, supra* at 284 (citation omitted).]

Given these similarities, we conclude that an action under MCL 450.1489 "would have been denominated as" equitable when "the 1963 constitution was adopted." *Anzaldua II, supra* at 565. Hence, the right to a jury trial does not "remain" under the Michigan Constitution for this action. Const 1963, art 1, § 14. Therefore, the trial court did not err when it concluded that plaintiff had no right to a jury trial.

III

Plaintiff next argues that a 2006 amendment to MCL 450.1489(3), see 2006 PA 68, § 489, should be applied retroactively. We disagree.

Whether a statutory amendment should be applied retroactively is a question of statutory construction that this Court reviews de novo. *Frank W. Lynch & Co. v. Flex Technologies, Inc.,* 463 Mich. 578, 583; 624 NW2d 180 (2001). In determining whether a statute should be

applied retroactively or prospectively, the primary rule is that legislative intent governs. *Id.* "Amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Tobin v. Providence Hosp.*, 244 Mich.App 626, 661; 624 NW2d 548 (2001). However, " 'statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested.' " *Lynch, supra* at 584, quoting *Franks v. White Pine Copper Division*, 422 Mich. 636, 672; 375 NW2d 715 (1985).

At the time of the bench trial, MCL 450.1489(3) defined "willfully unfair and oppressive conduct" to mean "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." In *Franchino, supra* at 184-186, this Court construed this definition and determined that, because employment and membership on the board of directors were not traditionally considered shareholder rights, termination of a shareholder's employment or membership on the board could not constitute conduct that substantially interfered with the interests of the shareholder as a shareholder. In granting defendants' motion for involuntary dismissal, the trial court relied on *Franchino* for the proposition that plaintiff's termination from employment could not support his claim of shareholder oppression. However, after the June 2005 involuntary dismissal of plaintiff's case, the Legislature amended MCL 450.1489(3) to include the following sentence: "Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." 2006 PA 68, § 489.

*7 There is no language in 2006 PA 68 that indicates a clear legislative intent to have the act apply retroactively. Hence, there is a presumption that the act operates prospectively only. *Tobin, supra* at 661. Further, because the amendment affects defendants' substantive rights by enlarging the scope of the conduct that constitutes willfully unfair and oppressive conduct, it cannot be applied retroactively as a remedial amendment. *Lynch, supra* at 584-586. Therefore, it only applies prospectively.

IV

Finally, plaintiff argues that the circuit court erred in granting defendants' motion for involuntary dismissal. We disagree. In a bench trial, a defendant may move for involuntary dismissal at the close of the plaintiff's proofs "on the ground that on the facts and the law the plaintiff has shown no right to relief." MCR 2.504(B)(2). "[A] motion for involuntary dismissal calls upon the trial judge to exercise his function as a trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian v. The Stroh Brewery Co.*, 123 Mich.App 719, 724; 333 NW2d 341 (1983). The evidence is not viewed in the light most favorable to the plaintiff. *Id.* Our review of an involuntary dismissal is de novo, but the court's findings of fact are reviewed for clear error. *Samuel D. Begola Services, Inc. v. Wild Bros*, 210 Mich.App 636, 639; 534 NW2d 217 (1995).

MCL 450.1489(1) allows a shareholder to "bring an action ... to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." As it existed during the circumstances of this dispute, MCL 450.1489(3) defined "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." See 2001 PA 57, § 489. We conclude that the trial court did not err in concluding that plaintiff failed to establish the requisite misconduct.

Plaintiff presented no evidence that defendants' actions were illegal or fraudulent. The court found, and the record supports, that defendant Forsberg's use of corporate resources did not amount to embezzlement, as various family members enjoyed similar benefits, including plaintiff. At best, plaintiff's evidence related to his claim that defendants' conduct was "willfully unfair and oppressive ." Yet the evidence failed to support such a claim.

Plaintiff was required to demonstrate "a continuing course of conduct or a significant action or series of actions that substantially interfere[d] with" his interests as a shareholder. MCL 450.1489(3). As the trial court found, defendant's actions did not rise to this level. Both defendant Forsberg and plaintiff reaped personal benefits incident to their ownership of defendant corporation, including insurance

benefits, corporate vehicles, gasoline, and various other personal expenses. The court found that defendant Forsberg enjoyed more personal benefits, but that this was offset by his financial contributions to defendant corporation. This conclusion is supported by the record, namely that defendant Forsberg loaned thousands of dollars to defendant corporation as circumstances warranted, when "cash flow" problems arose, and then personally assumed the costs associated with these loans. The court determined that the personal benefits enjoyed by the parties and their family were a common occurrence in the operation of defendant corporation, and the record supports this. There is accordingly little reason to suggest that plaintiff's evidence demonstrated willfully unfair and oppressive conduct because defendants' conduct effectively constituted consistently applied corporate policies. Cf. MCL 450.1489(3). Defendants' conduct was not willfully unfair and oppressive toward plaintiff as a shareholder, particularly given that plaintiff enjoyed benefits incident to the conduct he claims was willfully unfair and oppressive.

*8 Though the record supports the court's finding that plaintiff worked longer hours and took fewer vacations than defendant Forsberg, as the court also found, this does not illustrate conduct that substantially interfered with plaintiff's status as a shareholder. MCL 450.1489(3). As an owner of defendant corporation, plaintiff was free to work hours he chose, and he was not at liberty to compel another owner to do the same. The court found that plaintiff was the cause behind defendants' action to suspend his employment. That plaintiff was argumentative, hostile, and volatile in the work environment is evidenced in the record, and the court's determination was not erroneous. Furthermore, despite that it was the genesis of this dispute, plaintiff's removal from his employment was not grounds upon which the court could find he was oppressed as a shareholder. *Franchino, supra* at 186.

Plaintiff presented no evidence that his interests "as a shareholder" were substantially interfered with. *Id.* On the facts and the law, plaintiff was not entitled to relief. MCR 2.504(B)(2). The court's dismissal was proper.

Affirmed.

MURPHY, J. (concurring in part and dissenting in part).
I agree with the majority that the trial court did not err in dismissing the claim for wrongful termination. However, I disagree with the majority's conclusion that the trial court did not err in denying plaintiff's request for a jury trial. I would hold that plaintiff was entitled to a jury trial on his claim for money damages under MCL 450.1489. I further agree with the majority that the trial court did not err in granting defendants' motion for involuntary dismissal, but only to the extent that the dismissal reached plaintiff's claims for equitable relief, not the request for money damages. Finally, I agree with the majority that the 2006 amendment to MCL 450.1489(3) should not be applied retroactively.[1] Accordingly, I concur in part and dissent in part, and shall address only the jury trial issue.

My analysis requires interpretation of MCL 450.1489. Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v. Annapolis Hosp.* 471 Mich. 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id.* at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Bageris v. Brandon Twp,* 264 Mich.App 156, 162; 691 NW2d 459 (2004). "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v. Mecosta Co Gen Hosp,* 466 Mich. 57, 63; 642 NW2d 663 (2002).

*9 MCL 450.1489 provides a statutory basis for shareholders such as plaintiff to bring suit with respect to claims of illegal, fraudulent, or willfully unfair and oppressive acts. The statute provides, in pertinent part, as follows:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.

(b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

(c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.

(d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

(e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

(f) *An award of damages to the corporation or a shareholder.* An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first. [Emphasis added.]

While some of plaintiff's claims were for equitable relief, e.g., demands for repurchase of his shares and dissolution of the corporation, plaintiff also made a claim for money damages based on defendants' alleged willfully unfair and oppressive conduct.

Contrary to the majority's conclusion, I would find that our Supreme Court's decision in *Anzaldua v. Band*, 457 Mich. 530; 578 NW2d 306 (1998), dictates that plaintiff here had a statutory right to a jury trial for his money damages claim arising out of MCL 450.1489(1)(f). The *Anzaldua* Court indicated that a statutory cause of action may or may not provide a right to a jury trial depending on the intent of the Legislature as reflected by the words used in the statute. *Anzaldua, supra* at 533-548. In *Anzaldua*, the Supreme Court held that the Whistleblowers' Protection Act (WPA), MCL 15.361 et seq., and particularly sections 3 and 4 of the act, contains a right to a jury trial. Section 3 provides, in relevant part:

(1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

* * *

*10 (3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney fees. [MCL 15.363.] Section 4 provides:

> A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate. [MCL 15.364.]

The *Anzaldua* Court acknowledged that the WPA does not contain an express provision regarding whether an action brought under the act was to be tried by a judge or jury. *Anzaldua, supra* at 535. The Court also noted that the WPA provides several equitable remedies. *Id.* at 537. MCL 450.1489 also contains several equitable remedies. The *Anzaldua* Court, however, also stated that the WPA expressly provides for actual damages, which the Court found to be significant, and which indicated "that the Legislature intended that the damages issue be tried by a jury, upon request." *Anzaldua, supra* at 539. The Court reasoned:

> Like Congress, when it adopted the Age Discrimination in Employment Act and included "legal remedies," the Michigan Legislature created a cause of action in the WPA and provided for "actual damages." As far back as 1877, the Court has held that a jury is proper where a statute creates a cause of action for actual damages without specifying before whom the action is to be tried. The Legislature is deemed to be aware

> of the meaning given to the words it uses, including the jury right that accompanies actual damages. Our holding recognizes that the Legislature imported into the WPA the meaning of actual damages.... We hold that, by including that term, the Legislature intended that the act contain a right to a trial by jury. [*Anzaldua, supra* at 542-543.]

Here, MCL 450.1489(1)(f) provides for "[a]n award of damages." Therefore, consistent with *Anzaldua,* I would conclude that an action brought under MCL 450.1489 entitles a plaintiff to a trial by jury on any claim for money damages if properly and timely requested.

Footnote 6 in *Anzaldua, supra* at 538, discusses equitable and legal issues and situations in which both legal and equitable relief are requested:

> [W]e note that, under MCR 2.509(D), the court, on motion or its own initiative, may use a jury in an advisory capacity to try equitable issues. The parties may consent to have a jury decide issues that otherwise are not triable to a jury as a matter of right. Also, under subrule B, if a party has a right to a trial by jury but does not demand it, the court has discretionary authority to order a jury trial anyway.
>
> Moreover, as explained by the Court of Appeals in *Dutka v. Sinai Hosp of Detroit,* 143 Mich.App 170, 173-174; 371 NW2d 901 (1985):
>
> *11 "The parties have a constitutional right in Michigan to have equity claims heard by a judge sitting as a chancellor in equity. If a plaintiff seeks only equitable relief, he has no right to a trial by jury. *However, in this case, the plaintiff sought both equitable relief in the form of specific performance and legal relief in the form of damages. In this situation the plaintiff had a right to have a jury hear his damage claim.*
>
> * * *
>
> These cases, which allow a chancellor to award consequential damages along with equitable relief, do not bar plaintiff's demand for a jury where legal remedies are sought along with equitable relief. *The cases defendant relies on only suggest that in some instances a chancellor may also award money damages in fashioning an appropriate remedy. The cases do not bar a jury trial on legal claims when it has been properly demanded.* [Emphasis added.]"
>
> See also *B & M Die Co. v. Ford Motor Co.,* 167 Mich.App 176; 421 NW2d 620 (1988). [Citations omitted.]

MCL 450.1489 provides for both equitable and legal claims and relief, and plaintiff had a right to a trial by jury with respect to his claim for legal relief, i.e., money damages, while the claims for equitable relief could be decided by the judge.[2] It does not matter whether the determination on underlying factual questions, regarding whether there was illegal, fraudulent, or willfully unfair and oppressive conduct, can serve as the basis for either granting or denying *both* the equitable and the legal claims for relief. Indeed, in *Smith v. The Univ of Detroit,* 145 Mich.App 468, 479; 378 NW2d 511 (1985), this Court acknowledged that the consequence of accepting a party's right to a jury trial on an issue that may be dependent on facts that are also considered by a judge on an equitable claim may be "the startling possibility of contradictory findings in the same case on the common issue of fact...." (Emphasis deleted; citations omitted.) The *Smith* panel held:

> Therefore, in a case such as this where both equitable issues and jury submissible issues coexist, the proper procedure is to hold trial before a jury and follow presentation of evidence with two separate factual determinations; court factfinding on the equitable claims and jury factfinding on the claims of damages. [*Id.* at 479.][3]

I would hold that plaintiff was entitled to have a jury render a verdict on his claim for money damages despite the fact that the trial judge would also be examining the factual issues regarding whether there was illegal, fraudulent, or willfully unfair and oppressive conduct when making a ruling on the equitable claims. In light of my view that MCL 450.1489 provided plaintiff with a right to jury trial, it is unnecessary for me to explore any constitutional right to jury trial. See *Anzaldua, supra* at 549.

I respectfully disagree with the majority that language in the WPA distinguishes it from MCL 450.1489 such that the outcome in *Anzaldua* cannot be reached here. As noted above, the WPA provides that "[a] court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits

and seniority rights, actual damages, or any combination of these remedies." MCL 15.364. MCL 450.1489(1) provides that, "[i]f the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following...." Both statutes reference the court ordering relief that the court deems or considers appropriate. Such language did not prevent the Court in *Anzaldua* from finding that a right to jury trial existed. The *Anzaldua* Court did note that the "rendering a judgment" language of the WPA indicated that a judge would be entering an order based on previously decided factual issues and not that the judge would be making a determination on whether to award damages. *Anzaldua, supra* at 536. I do not believe that simply because MCL 450.1489 lacks the "rendering a judgment" language that it is distinguishable.

*12 *Anzaldua* distinguished the WPA's attorney fee provision, finding that there was no right to jury trial on the issue of attorney fees, where the "WPA provides that the court is to 'award attorney fees.' " Anzaldua, supra at 537. The Court had stated that there is a difference between "rendering a judgment" and "awarding damages." *Id.* at 536. MCL 450.1489(1), however, does not directly state that the court is to or may award, among other relief, damages, rather, it provides that a court may "make an order or grant relief ... providing for" an award of damages "[i]f the shareholder establishes grounds for relief[.]" (Emphasis added.) This language suggests that the court can enter an order granting or providing for a damage award on the basis of a previous finding that the shareholder established grounds for monetary relief, and not necessarily that the court itself had to render a factual finding on money damages. Further, the trial court's ability to "grant relief" under MCL 450.1489(1) could certainly encompass the rendering of a judgment. I see no reason why the entry of an order under MCL 450.1489 cannot be premised on a jury verdict. Moreover, and importantly, the *Anzaldua* Court noted that attorney fees have traditionally been within the province of a judge and not a jury, and the primary focus and basis of the Supreme Court's ruling that a right to jury trial exists under the WPA was the language providing for a damage award, which is also provided in MCL 450.1489, and which has traditionally been within the province of a jury if demanded. *Anzaldua, supra* at 537-548.

Additionally, the majority's reliance on the history of MCL 450.1489 is unavailing because, as the majority itself concedes, MCL 450.1825, the predecessor of MCL 450.1489, see 1972 PA 284, did not specifically authorize an award of damages.

Finally, my agreement with the majority that the trial court did not err in granting the motion for involuntary dismissal relative to the equitable claims does not negate my position nor mean that a jury could not have found differently on the claim for money damages even though it would have been assessing similar facts and making comparable determinations. See *Smith, supra* at 479. I also disagree with defendants that reversal would be unwarranted because the trial court indicated that it would have granted a directed verdict if a jury trial had been required. First, a motion for a directed verdict requires the court to view the evidence in a light most favorable to the adverse party, and if reasonable persons could reach different conclusions the case is properly left to the jury. *Smith v. Jones*, 246 Mich.App 270, 273; 632 NW2d 509 (2001). The motion for involuntary dismissal under MCR 2.504(B) required the trial court to act as the trier of fact, weigh the evidence, select between conflicting inferences, and reflect on the credibility of the witnesses. *Marderosian v. The Stroh Brewery Co .*, 123 Mich.App 719, 724; 333 NW2d 341 (1983). The evidence is not viewed in a light most favorable to the plaintiff. *Id.* In my opinion, even though I cannot conclude that the trial court clearly erred in its factfinding with regard to the motion for involuntary dismissal relative to equitable relief, *Samuel D. Begola Services, Inc. v. Wild Bros*, 210 Mich.App 636, 639; 534 NW2d 217 (1995), there was sufficient evidence to allow the claim for money damages to go to a jury under the principles regarding motions for directed verdict. Furthermore, I question whether a harmless error analysis is appropriate in the context of a denial of plaintiff's statutory right to a jury trial.

*13 I would affirm in part, reverse in part, and remand for a jury trial on plaintiff's claim for money damages. Accordingly, I respectfully concur in part and dissent in part.

Footnotes

1 I note that the amendment did not even become effective until after the trial and after the claim of appeal was filed. 2006 PA 68.

2 MCL 450.1489(1)(f) clearly distinguishes a claim for money damages and even provides a separate statute of limitations specifically for such claims.

3 See also *The Meyer & Anna Prentis Family Foundation, Inc. v. Barbara Ann Karmanos Cancer Institute*, 266 Mich.App 39, 53; 698 NW2d 900 (2005) (appropriate for jury to determine factual issues relative to damages claim and court to determine factual issues relative to equitable claim in the same case).

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